SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ET AL., PETITIONERS,

vs.

NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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[fol. 6] Disorderly Conduct

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 11, County of .....

CERTIFIED COPY OF COMPLAINTS

State of New York,

County of NY, ss.:

Ptl. Robert Annitto 16 Pct. being duly sworn, says that at 4:25 PM on Aug. 8, 1964, at vicinity Duffy Sq—47 St. and B'way in the County of NY, City and State of New York, the defendants 1. William Turner; 2. Albert Maher; 3. Levi Laub; 4. Richard Rhoads; 5. Theodore Ostrow; 6. Joyce Chadwick; 7. Ellen Shallit; 8. Arthur Kunis; 9. Bruno Eckardt; 10. Vincent Copeland; 11. Jeremiah Gelles; 12. Ann Kyllingstad; 13. Pierre Meisner; 14. Fred Jerome; 15. Jeremiah Teahan; 16. Key Martin; 17. Robert Apter committed the offense of disorderly conduct in violation of Section 722, Sub-division 2, 3, 4 of the Penal Law, in that with intent to provoke a breach of the peace and under circumstances whereby a breach of the peace might be occasioned, the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; When ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful.

Wherefore deponent prays that the defendant be dealt with according to law.

Robert J. Annitto.

Pending Leaves: (see R & P 14/26.0)

Vacation None

Other Leave: .....

.....

Sworn to before me, Aug. 8, 1964, Arthur Dunarif, Judge.

[fol. 12]

CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2D—COUNTY OF NEW YORK

Docket No's. C 15605 – C 15621

Charge: Dis. Con. (All Defendants)

Docket No's. C 15646 & C 15640

Charge: Ad. Code Vio. – 435-6.0
(Laub & Copeland)

PEOPLE OF THE STATE OF NEW YORK

—against—

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER, Defendants.

Court Reporter's Minutes

September 30, 1964

Before: Hon. Vincent R. Impellitteri.

APPEARANCES:

Michael H. Metzger, Esq., Assistant District Attorney, New York County, For the People;

Nanette Dembitz, Esq., 156 Fifth Avenue, New York, New York, and Janet Johnson, Esq., Co-counsel, 156 Fifth Avenue, New York, New York, for all defendants on the Dis. Con.

[fol. 13]

Conrad J. Lynn, Esq., 401 Broadway, New York, New York, and Gene Ann Condon, Esq., 401 Broadway, New York, New York, for Laub & Copeland on the Ad. Code Vio.

Court Officer, John Schulz.
Court Reporter, Anthony Lackatas.

[fol. 14]

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Metzger: Your Honor, this case was on in 2A on the 25th of September at which time we agreed—the defense counsel and myself—that this would be a trial date. Miss Dembitz told me and the court that she was not representing the defendants Laub and Copeland with respect to the Administrative Code violations. They were told [fol. 15] by the sitting justice, at that time, that they must have their attorneys here with respect to that case. The People will move—their attorney is here, by the way—the People will move to consolidate the Administrative Code Violations against the defendants Laub and Copeland so that they may be tried together with the charges of disorderly conduct against them. The arrests were made by the same officers. They grow out of the same events. They are moments apart if not identical in time.

[fol. 17] The Court: Then you stipulate that the cases, with reference to the violation of the Administrative Code, with reference to the defendants Levi Laub and Vincent Copeland, be tried together with a charge involving the alleged violation of the disorderly conduct section?

Mr. Lynn: Yes.

The Court: The Court will have a right to apply the facts in each case where applicable and then render separate and distinct decisions.

Mr. Lynn: Your Honor, if we rely on the district attorney to be sure that there isn't any confusion of the charges or of the evidence and that any evidence directed to this charge will be clearly indicated and directed only to the

defendants Laub and Copeland on the Administrative Code charge.

[fol. 18] The Court: All right. Then both sides are ready, as I understand it, in each case. Proceed.

Miss Dembitz: Before the case commences, your Honor, I respectfully move that the witnesses be excluded—the prosecution's witnesses be excluded from the courtroom while each is testifying.

Mr. Metzger: Your Honor, if that motion is directed, it's merely to the prosecution's witnesses. I ask that it include all witnesses in this case that are not defendants.

The Court: All witnesses in this case, on both sides, are excluded from the courtroom until called.

(Witnesses leave courtroom.)

Det. Fritz O. Behr, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield and assignment.

The Witness: Det. Fritz O. Behr, shield 279, assigned to the Bureau of Special Services.

Direct examination.

By Mr. Metzger:

Q. August 8, 1964, were you on duty?

A. I was.

Q. Did you have occasion to be in the vicinity of Times [fol. 19] Square at any time on that day?

A. I was.

Q. What time did you arrive?

A. At approximately 3:35 PM my brother officer, Ptl. Frank Koopman, shield 22472, also assigned to the Bureau of Special Services, and I were proceeding north on Sixth Avenue in my automobile, and we arrived at the corner of 45 Street. At that location we noticed a white corvair Chevrolet convertible in which were Mr. Levi Laub, Mr. Albert Maher, and Mr. Philip Albert Luce.

The Court: Hold it a minute. Who did you say?

The Witness: The defendants Laub and Maher and an additional party.

The Court: Hold the wire.

The Witness: And an additional party who is not a defendant. They turned left into 45th Street and parked their automobile in a garage there on the southwest corner. My brother officer and I parked our vehicle slightly further along west on—45th Street this is—45th Street and we awaited the arrival from the garage of the three persons just mentioned. After a very short time, perhaps two or three minutes, Mr. Laub, Mr. Luce and Mr. Maher, came out of the garage. Mr. Maher was carrying a battery-operated megaphone. They proceeded on 45th Street west [fol. 20] to Seventh Avenue. My brother officer and I walked behind them. They turned right on Seventh Avenue and walked north to the vicinity of 47th Street. At approximately—

The Court: He has answered your question. This is all extra information.

Mr. Metzger: I would like him to testify as to what he observed from the period of time. That's for the next hour or so—just briefly.

The Witness: At approximately four o'clock, Mr. Levi Laub mounted the steps on the southern end of the statue.

Mr. Metzger: This is Duffy Square?

The Witness: Yes, this is Duffy Square.

Mr. Metzger: All right. Hold it. By agreement with the defense counsel, the People are going—with graph in evidence at this time as being an accurate, fair representation of Duffy Square in the county of New York.

Miss Dembitz: I am willing to accept that subject to the fact that the lower—the extreme southern end of the Square is not shown on the photograph.

Mr. Metzger: For whatever is shown on the photograph.

Mr. Lynn: May I look at it?

[fol. 21] Mr. Metzger: This is not offered with respect to the Administrative Code violation.

Mr. Lynn: You are talking about Mr. Laub now.

Mr. Metzger: Is that all right with you?

Miss Dembitz: Let me see it.

Mr. Metzger: This is then offered as People's Exhibit one and ask that it be so marked.

The Court: Any objection?

Miss Dembitz: No.

The Court: Mark it People's Exhibit one in evidence.

(Marked in evidence as People's Exhibit 1.)

Court Officer: So marked.

[fol. 21-A]

SUPREME COURT OF THE UNITED STATES

WILLIAM TURNER, et al., Petitioners

v.

PEOPLE OF THE STATE OF NEW YORK, Respondents.

STIPULATION AS TO LOST EXHIBIT

It is hereby stipulated and agreed, by and between the attorneys for the parties to the above-entitled case, that the photograph of Duffy Square in New York City, introduced in the trial court as People's Exhibit 1 (at page 21 of the transcript of the evidence) has become unavailable, and that the attached photograph is an accurate representation of such Square, except for the fact that the extremities of such Square do not appear in the photograph.

It is further stipulated and agreed that the photograph shows less than a full view of the street in the foreground, and that such street is approximately the width of the street in the background.

Frank S. Hogan, per Frederick P. Hafetz, District Attorney, New York County;

Nanette Dembitz, Attorney for Petitioners.

July , 1966

Mr. Metzger: Continue Det. Behr.

The Court: The places you mentioned are located in the County of New York?

The Witness: Yes, your Honor.

The Court: All right. Mr. Laub mounted the steps at the southern end of the statue at approximately four o'clock?

Mr. Metzger: That's the statue depicted in this picture?

The Witness: That's correct. He held the battery-powered megaphone up to his mouth and proceeded to speak into it. He stated that the May 2nd movement had [fol. 22] called this meeting and then proceeded to introduce Mr. Philip Luce, whom he stated would be the chairman for this meeting. Mr. Luce began to speak. At this point, representatives of the Police Department, a captain and an inspector, spoke to Mr. Luce, Mr. Laub, Mr. Maher, and, I believe, also Mr. Copeland. They informed him—

Miss Johnson: Objection.

Mr. Metzger: Just a minute. This was a conversation directed to the defendants in the defendants' presence, is that right?

The Witness: That's correct.

The Court: This is with reference, you say, to the defendants Laub—

The Witness: Laub.

The Court: Maher—

The Witness: Maher.

The Court: And Copeland?

The Witness: And Copeland.

The Court: There is an objection?

Mr. Lynn: I have an objection. I don't know whether he is the one who talked to Laub or someone else.

Mr. Metzger: No, he is not the one.

Miss Johnson: Sounded as though he was going to testify that some other police officer was talking to him.

[fol. 23] The Court: This conversation, whoever had it, was it in your presence and hearing?

The Witness: Yes, your Honor.

The Court: The objection is overruled.

Mr. Metzger: Would you say what you heard the police officers say to Mr. Laub and Mr. Copeland?

The Witness: The police captain informed Mr. Laub, Mr. Maher, and Mr. Copeland, and Mr. Luce, that at the present time the demonstration was interfering with pedestrian and vehicular traffic; that people had to walk into the street to get by.

Miss Dembitz: Objection. I think that the witness should testify as to the exact words that were used by the captain and the inspector.

The Court: Are you giving us your best recollection, the substance of what was said?

The Witness: That's correct.

The Court: Objection overruled.

The Witness: That in view of this interference with pedestrian and vehicular traffic, that the meeting would have to be terminated at this location at this time.

Mr. Laub then took the battery-operated megaphone again and put it up to his mouth and proceeded to speak into it and spoke to the people assembled there. There were [fol. 24] approximately two hundred people assembled there. He stated to them that this captain—I believe he stated, "The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here".

Then he informed the people that in spite of this, they would continue their demonstration and he again gave—I believe he gave the megaphone to Mr. Copeland—no, to Mr. Luce, again. Mr. Luce then continued to speak and introduce Mr. Vincent Copeland. Mr. Copeland spoke into another battery-operated megaphone which he carried. He spoke to the people there, speaking of the crimes of American imperialism against the working people.

Mr. Lynn: Objection unless this is exactly what he said.

The Witness: This is what he said.

Mr. Metzger: I don't know that a witness has to testify verbatim to words that he heard. He can testify to the best of his recollection.

Mr. Lynn: The question is whether it's material. The charge is not what he said, but the use of this battery-operated device.

The Court: Objection overruled.

Mr. Lynn: Exception.

[fol. 25] By Mr. Metzger:

Q. In any event, he did speak over this?

A. He did.

Q. We don't have to go into the words any further.

A. He spoke to the people there that the police department didn't have any right to monitor their demonstration and he felt that if everybody stayed there and protested to the utmost, that the police department couldn't do anything about their meeting. At this point the police captain approached Mr. Copeland, Mr. Maher, Mr. Laub, and Mr. Luce, and again told them that the demonstration was interfering with pedestrian traffic and vehicular traffic and that the meeting at this point, at this location, and this time, would have to be terminated. Mr. Laub again took the battery-operated megaphone and spoke into it and again said that in spite of this, what the captain had told them, that they would continue their meeting.

Q. Now, officer, from the time you first arrived at Duffy Square until approximately 4:30, could you give a description of what you saw with respect to the general conditions there?

A. I saw many persons carrying placards. Some of them large, some were small. Persons there had paper mache masks which they wore. One person, Mr. Bruno Eckardt, [fol. 26] I believe, one of the defendants, carried a drum. He proceeded to beat on this drum.

Q. Rather than get into the specifics, tell us, by looking at People's Exhibit one, this picture, what you saw with

respect to people at the time. Say what time you are talking about and where you saw people and generally what they were doing.

A. From approximately four o'clock to approximately 4:20, there were persons standing—the persons who were speaking were generally standing on the steps, your Honor.

Q. Indicating the north steps.

A. The south steps. This is facing south and this is north. This is west, and over here is east. Mr. Laub and Mr. Copeland and Mr. Luce and Mr. Maher—

Q. How many people would you say?

A. The other people speaking were standing on the steps. There were approximately two hundred people who took up the entire area from where the bus is, into the street and over to this side where this automobile, is apparently a cab, also into the street. The people varied from the bottom of the steps down to about the middle of the grating. It was covered from side to side. The people with the drum and the masks I was speaking of, were standing at this southwest corner of the steps down here, your Honor.

[fol. 27] Q. How many people would you say were within that general perimeter—the cement area of Duffy Square Park from the south end of the statue and down towards the foliage?

A. From approximately here to the foliage down here?

Q. Yes, across the grating and down to the foliage.

A. Altogether, I would estimate approximately two hundred.

Q. How about the rest of the area, the streets and the other sidewalks and the other side of the avenues?

A. North of the statue, persons walking here on the west side and east side of Times Square, I would say there were, altogether, four to five thousand persons.

Q. Are you including both sides of the street and the opposite corners?

A. That's correct.

Miss Dembitz: Would you repeat that testimony, please. I didn't quite get it.

The Court: The stenographer will repeat it. (The last two questions and answers were read by the stenographer)

Miss Dembitz: I object to that question and ask that the answer be stricken. It is not relevant to this arrest or this charge which charge relates only to an unlawful congregation and assembly in this area of these defendants. What was the situation in the rest of the area at this time is not [fol. 28] relevant to this case when we have gone to, as I understand it, the opposite street corner—the two opposite streets from the area we are concerned with in this case.

The Court: Objection overruled.

By Mr. Metzger:

Q. What would you say about the condition of the streets themselves—I am not referring to the sidewalks—during this period of time you made your observations.

A. On the streets, especially adjacent to the east side and west side of the triangular Duffy Square, here, the persons—generally passers-by walking south and north on this area, on both sides.

Q. You are indicating the sidewalks?

A. On the sidewalks, both here and here, and coming north from the southern end of the area, at this point, and at this point, were forced to go into the street to walk around the people assembled and collected for the demonstration. Automobiles were veering sharply to the right on Broadway and to the left on Seventh Avenue to avoid persons who were in the street walking north and south around the demonstration.

Q. Did you see anyone else but pedestrians in the street during this period of time?

A. Some of the demonstrators were in the street on both sides off the sidewalk and in the street.

Q. How were you able to distinguish between a pedes- [fol. 29] trian and what you term a demonstrator?

A. The pedestrians were moving north and south, for one thing, and I have seen numerous of these people on various occasions.

Miss Dembitz: I object.

The Court: Sustained.

The Witness: They were carrying placards.

Q. Did you see any of the defendants in this case in the street during this period of time?

A. Yes.

Miss Johnson: Who?

Q. I am going to show you a picture, Detective, and ask you whether or not you recognize anyone in that picture?

A. I do.

Q. Would you say who you recognize?

A. I see the defendants Jeremiah Gelles—as I'm looking at the photo—on the extreme left—Jeremiah Gelles. Mr. Levi Laub next to him holding the megaphone. Next to him, Mr. Copeland with the megaphone in front of his mouth. Next to him Jeremiah Teahan, and behind him, Mr. Pierre-Meisner.

* * * * * * *

[fol. 31] Cross examination.

By Miss Dembitz:

Q. Det. Behr, you testified that you arrived in the area at about 3:35?

A. That's correct.

Q. You testified that a captain and an inspector spoke to Mr. Luce and Mr. Laub?

A. Among other people, yes.

Q. Who first spoke to Mr. Laub about the holding of this meeting?

A. The captain and the inspector.

Q. What are the names of the captain and the inspector?

[fol. 32] A. I believe it's Captain McAllister and Inspector Ralph Lewis—I believe.

Q. You saw no one approach Mr. Laub prior to Captain McAllister and Inspector Lewis approaching them?

A. I don't understand the question?

Q. You saw no member of the police force, the Special Services, or of any City department approach Mr. Laub prior to Captain McAllister and Inspector Lewis?

A. I don't recall seeing anyone else speak to them prior to that; not from the City.

Q. Det. Behr, you testified that you saw four or five thousand people in the area. What do you mean by "in the area"?

Mr. Metzger: You want to use the picture?

A. Well, this location is where 47th Street crosses both Seventh Avenue and Broadway. By "in the area", I mean in that block from 47th Street down to 46th Street on the sidewalk of Seventh Avenue between 46th and Seventh and Broadway between 46th and 47th. Some people were also on the north sidewalk of 47th Street which faces on to Duffy Square—on to the northern end of it.

Q. Have you been assigned to this precinct, or are you assigned to this precinct?

A. Ordinarily?

Q. Ordinarily.

[fol. 33] A. No.

Q. Are you familiar with this area ordinarily?

A. Yes, I am.

Q. Was this an unusual number of people on the sidewalk between 46th and 47th Street?

A. I would say yes.

Q. Do you know why they were there?

Mr. Metzger: I object to that. That calls for an operation of his mind.

Miss Dembitz: All right.

The Court: Sustained.

Q. Det. Behr, when you observed this gathering on Duffy Square, did you observe that there were some individuals with black arm bands on the perimeter of the gathering?

A. There were people with black arm bands.

Q. Did you observe that they were on the outside of the gathering?

Mr. Metzger: Your Honor, I am going to have to object to this unless the time—

Q. Well, the time is from four to 4:20, and I am asking whether you observed the people with black arm bands on the periphery of the group standing on Duffy Square at any time between four and 4:20?

A. I saw people with black arm bands, among them Miss [fol. 34] Shallit. I can't recall now whether they were on the periphery or with the other people in the demonstration.

Q. You testified that you observed some people in the street, is that correct?

A. That's correct.

Q. You testified that you thought some of these were some of the defendants. Which defendants were in the street?

A. From time to time they were on the sidewalk and then they were in the street.

Q. Which defendants were on the street when?

A. Among them, Mr. Kunis, Mr. Eckardt.

The Court: Go slower. Mr. Junis—

The Witness: Mr. Eckardt.

The Court: Go ahead.

The Witness: Miss Kyllingstad.

The Court: Go ahead.

The Witness: That's offhand what I can recall now.

Q. Did you state to these defendants that they should stay on the sidewalk?

A. Did I?

Q. Did you.

A. No, ma'am.

Q. Did any police officer state to the defendants to stay [fol. 35] on the sidewalk in your hearing?

Mr. Metzger: That's objected to.

Q. In your hearing, did any police officer state to the defendants that they should stay on the sidewalk?

Mr. Metzger: No objection.

A. Not that I heard.

Q. Det. Behr, you have stated that you saw traffic veering, I believe, to the right. Was that your testimony?

A. On which street?

Q. On Seventh Avenue. Is that your testimony?

A. No. It veered to the right on Broadway and to the left on Seventh Avenue.

Q. When you say it veered to the right, how many lanes of traffic are there on Seventh Avenue?

A. I am not sure.

Q. You don't recall?

A. No.

Q. You do recall seeing it veer?

A. Yes.

Q. But you can't recall how many lanes of traffic there are?

A. That's right.

Q. Do you recall how many lanes of traffic there are on Broadway?

[fol. 36] A. I don't know whether it would be three or four or how many, offhand.

Q. What do you mean by "veering to the right," or "veering to the left"?

A. Ordinarily, traffic would flow in all the lanes that are there, but in the lanes immediately adjacent to Duffy Square, on that day and during that time, traffic couldn't go southbound on both of these thoroughfares because of the people standing—some of the demonstrators standing in the street at that point and pedestrians who walked around them.

Q. When you say, "it veered," you mean it veered from one lane to another and continued to move? If you say "it veered," you must mean that it switched from one lane to another and proceeded down the avenue, is that correct?

A. That's correct. When the traffic was north of this place where the defendants and passers-by were in the

street, the traffic was able to come in a southerly direction. When the people were standing in the lane of traffic at that location, the traffic had to switch to the outermost lane in order to proceed south.

Q. In order to continue down the avenue?

A. Yes, during the demonstration.

[fol. 37] Q. Was there any other officer directing traffic during the period that you were at Duffy Square and during the period in which you say that traffic was quote, "veering"? Was there anyone directing traffic in your observation?

A. At that particular point, I saw no one directing traffic.

Q. Det. Behr, what would you say is the approximate distance between the steps where the speakers were standing and this hedge enclosure towards the south? What is the approximate distance from the southern steps to this enclosure longitudinally north to south?

A. I would estimate it at perhaps 75 feet.

Q. Seventy-five feet?

A. Seventy-five feet.

Q. What is the distance, Det. Behr, at this point in the square—I am pointing to the area over the subway grating to the south of the steps and north of the hedges—what would you say is the width of that area?

A. Are you speaking of the midway point on the grating or the southern end?

Q. The midway point.

A. I would have to estimate it to be approximately thirty-five feet.

Q. What would you estimate is the distance directly be-[fol. 38] low—directly to the south of the steps from east to west?

A. I would say no more than fifty feet.

Q. Det. Behr, did you observe that—what did you observe to be the conduct of the people listening to the speakers other than what you have testified as to their location? Did you observe pushing, shoving, fisticuffs, crowding, dis-

order of any sort in the assembly that was listening to their speakers—that is the assembly to the south of the steps?

A. You are referring to the two hundred persons present at the demonstration?

Q. I am referring to the persons you said to be two hundred persons at the demonstration. Did you observe any disorder among those demonstrators?

A. I don't know what you mean by "disorder".

Q. Did you observe pushing, shoving, fisticuffs, wrestling, throwing of anything. Disorder I think is a term that most of us are familiar with. It consists of violence, wrestling, pushing, trampling. Did you observe any physical acts of any sort of disorder?

A. I observed persons holding placards, shouting. I heard these persons repeatedly chanting, "Let him speak. Let him speak," when they were informed that the police—[fol. 39] when they were informed by Mr. Laub that the police said they could not continue the demonstration. I heard the drum being beaten. I saw Mr. Albert Maher take a rolled up placard and strike one of the horses of the mounted police several times.

Q. Just a minute, I am asking you about the conduct of the crowd during the speeches before the police broke up the meeting.

Mr. Metzger: Well, now, I am going to object to the form of that question.

The Court: Objection sustained.

Q. I am asking you about the conduct of the crowd before Mr. Laub was told that the meeting would have to cease.

The Court: You ask him what his observation is, what he saw that he considered to be disorderly. He was in the process of giving you, as I understood it, several instances which he considered to be disorderly. Then, in the middle of it, you put another question.

Miss Dembitz: Your Honor, if I may explain. My question was directed at, and we believe this case revolves

around the conduct of this assembly prior to the police giving the order that has been testified to. I therefore am asking the detective only with respect to the conduct of the assembly before the police gave the order. So, if I may, [fol. 40] I do not believe that it's relevant to our presentation what the conduct was after the police gave the order.

The Court: I will overrule that. I will take it before, during and after. It's all part and parcel.

Miss Dembitz: I object to that testimony. I object to any testimony of that sort on constitutional grounds because it is our constitutional contention that this was a lawful assembly and any conduct that happened after the order to leave is lawful and is not part of the conduct that is charged here.

The Court: I will pass upon those objections as they arise. At this point, I am not going to take a general objection because I don't know, specifically, what your objection is. But, in any event, at this point, the objection is overruled with an exception to each defendant.

Are the defendants seated as they were when the case was originally called? I have seen some movement around. I want to make sure.

Mr. Lynn: If the Court please, I put Mr. Levi Laub and Mr. Copeland together for the convenience of counsel since I am representing them and they are charged under the Administrative Code, so I moved them together. That's what I did this morning.

The Court: It can't be done that way because you see [fol. 41] there are seventeen defendants and it's difficult to keep a box score unless I know which defendants we are talking about. You will have opportunity to confer with them.

By Miss Dembitz:

Q. Det. Behr, what were your orders when you went to Duffy Square?

Mr. Metzger: I object to that, your Honor. That's not material.

The Court: Objection sustained.

Miss Dembitz: Your Honor, I think it is material what the purpose of the police was in coming to Duffy Square. It bears on the reason for the arrest here.

The Court: I have ruled. You may have an exception.

Q. Det. Behr, you have testified that Captain McAllister and Inspector Lewis, as well as you and your brother officer, Officer Koopman, were in this area. How many other officers converged on Duffy Square by the time of the culmination of these arrests?

Mr. Metzger: I object to the form of the question.

The Court: Eliminate the word converged, then I don't think he will have any objection.

Mr. Metzger: That's right, your Honor.

The Court: Eliminate that word.

[fol. 42] Miss Dembitz: I will be glad to.

By Miss Dembitz:

Q. How many officers were present at Duffy Square at the time of the culmination of the arrests that were made here?

Mr. Metzger: This is objected to on two grounds. In the first place, it's not asking for what he saw, it's asking for an absolute fact. In the second place I don't understand what she means by "culmination of the arrest". This is too vague and I think objectionable.

The Court: Objection overruled.

Q. At the time of the arrests of the defendants who are charged here, at that time, how many officers, to the best of your observation and recollection, were there on or near Duffy Square?

A. To the best of my recollection and knowledge, I would have to say approximately fifteen, perhaps sixteen, at Duffy Square location.

Q. Were these officers or any on foot or on horseback?

A. As I recall, I saw two officers on horseback. The rest on foot.

Q. What was the elapsed time between the time that Captain McAllister and the Inspector arrived at the Duffy Square and the time that the remaining number of officers [fol. 43] arrived at Duffy Square?

A. I don't know, counsel.

Q. Can you approximate it?

A. I don't know when the inspector got there, to start with. He may have been in the Square before I arrived there. I don't know.

Q. I am speaking of the time you saw him, according to your testimony, address Mr. Laub. From that time until the time that the other fifteen or so officers, including the two or so on horseback arrived, can you tell me what was the time that was elapsed?

The Court: You are speaking of the first time they spoke to Mr. Laub or the second time?

Miss Dembitz: I am speaking of the first time.

The Witness: Approximately fifteen minutes. I really don't know. I am just estimating.

Q. Det. Behr, you made some mention of pedestrians. Did anyone complain to you that he couldn't walk on the square or couldn't cross the street or couldn't move down the street?

A. I heard several pedestrians speaking to uniformed police officers at the scene.

Q. Did anyone speak to you?

A. To me, not directly. I wasn't in uniform.

[fol. 44] The Court: Did any pedestrian, in your presence, complain to police officers in uniform?

The Witness: Yes, your Honor.

Miss Dembitz: What did the police officers say?

The Court: What did they both say? What did the police officers say to the pedestrians and what did the pedestrians say to the police officers, in your presence?

The Witness: The exact words, I don't recall. In substance, the persons were complaining that they had to walk in the street when the bunch—one person called them beatniks—were standing here holding a meeting and the police informed them that these people had already been informed because of this they couldn't continue their meeting.

The Court: Because of what?

The Witness: Because of the fact that the pedestrians had to walk in the street.

The Court: That's what the pedestrians were complaining of?

The Witness: Yes, Your Honor.

By Miss Dembitz:

Q. You have testified that at no time did you hear a police officer tell anyone to get up to the curb at Duffy Square out [fol. 45] of the street?

A. At what time?

Mr. Metzger: That's objected to.

Q. You were asked before, Det. Behr, whether you, or in your hearing, any officer directed pedestrians or defendants to get up on the sidewalk. You testified, when I asked you, that you did not give any such direction and you didn't hear anybody give such direction, is that correct?

Mr. Metzger: Your Honor, that's objected to as not having been answered.

The Court: Objection sustained.

Miss Dembitz: I believe, your Honor, respectfully, I recall his testimony, but if not, I will ask the question now.

By Miss Dembitz:

Q. Did you instruct anyone to mount the curb on to Duffy Square from the street?

A. I don't know exactly what point you are speaking of.

Q. At any time between four and 4:20, which is the hours we are concerned with.

A. I, myself, no.

Q. Did you hear any officer signal or directing people to come out of the street on to the pavement?

A. Signalling, yes. With the shouting that was going on, [fol. 46] I couldn't hear what they were saying to these people, counselor.

Q. Det. Behr, have you been previously in this area at the time of demonstrations—in the Times Square area?

A. I don't recall if I have been in the area during demonstrations.

The Court: Times Square is a pretty big area. You referring specifically to the area in and about Duffy Square?

Miss Dembitz: I am referring to both south and north of Duffy Square in the Times Square area and—

The Court: You mean all the way down to what street?

Miss Dembitz: 42nd. I'm sorry, your Honor. I was using the term loosely.

Q. Between 42nd and 47th Streets, have you observed other demonstrations in this area?

A. To the best of ~~my~~ recollection, in that area, no, counselor.

Q. You did not observe a demonstration around the naval recruiting station between 42nd and 43rd Streets around the time of the demonstration which is involved here?

A. You mean the same day?

Q. I don't mean the same day. I mean within a week of this demonstration.

[fol. 47] Mr. Metzger: I fail to see the materiality.

The Witness: No, Ma'am.

Mr. Metzger: I thought it was going to be a yes or no.

The Court: You objecting?

Mr. Metzger: Yes.

The Court: Objection sustained.

Miss Dembitz: Your Honor, we take an exception. The materiality is that we want to show that there are and have been traditionally other assemblies in this area.

The Court: The ruling stands. You may have an exception.

Miss Dembitz: May I have a moment to confer with co-counsel?

The Court: Surely.

By Miss Dembitz:

Q. Det. Behr, one or two more questions. For the sake of clarification, you testified that after the Captain, McAllister, and the inspector spoke to Mr. Laub, and Mr. Laub made a statement to the effect that "this is a lawful meeting and we will continue it," you testified that there were then shouts of "Let him speak," is that correct?

A. After the second time?

[fol. 48] Q. Yes.

A. The captain spoke to Mr. Laub twice. After the second time, to my recollection, when he again told those persons assembled thereat that they were going to continue the demonstration, I believe it was at this point that the crowd began to shout, "Let him speak. Let him speak".

Q. Yes, prior to that occasion, were the—was the crowd listening to the speeches being made by Mr. Luce, Mr. Laub, and Mr. Copeland?

Mr. Metzger: Objected to.

The Court: Objection overruled.

Q. Some were and some weren't. Some were talking and some holding up placards. Some were standing in the street shouting. Some were listening and some weren't.

Q. When you say "Some were standing in the street shouting," will you please describe that? What were they shouting?

A. I don't recall exactly who was shouting what at this point. With the drum going on, and many persons talking, the bull horns going, I don't recall what they were shouting, but their mouths were moving and there were loud utterances coming from their mouths.

Q. Were any of these defendants shouting?

A. Offhand, I don't recall which defendant was shouting where.

[fol. 49] Q. Do you recall seeing any defendant shouting? Can you state the name of any defendant whom you saw shouting?

A. I don't know what time you are talking about.

Q. Let me review this for one moment, if your Honor will indulge me, because this is very important to our case, your Honor.

We are speaking of the time before Captain McAllister told Mr. Laub that the meeting would have to disperse, right?

A. Yes.

Q. Addressing yourself to that time, I am asking you whether you observed, or whether you heard any of the defendants shouting?

A. May I have a minute to refresh my recollection? Can I think about it a minute?

Q. Fine.

A. There are seventeen defendants. Offhand, I can't say. I can't say what individual defendant was shouting what at what time.

The Court: Was there shouting going on? Whether or not you can point to any particular defendant, was there shouting going on?

The Witness: Quite a bit.

Q. Was this shouting to the extent that it drowned out the speakers?

[fol. 50] Mr. Metzger: Your Honor—

Miss Dembitz: Your Honor, I believe—

Mr. Metzger: I withdraw the objection.

Miss Dembitz: There was shouting, which is so vague and loose and undefined, that we have a right to try to press the witness a little on this point, particularly since the complaint—one of the major charges is that there was

loud and boisterous doings going on there. I think whether the defendants were—

Mr. Metzger: I withdrew the objection.

The Witness: There was a lot of loud shouting going on, but by use of the battery-powered megaphones, the speakers could be heard.

By Miss Dembitz:

Q. Your testimony is, detective, that you cannot state that any defendant engaged in this so-called shouting and you cannot state precisely what was shouted or where it was shouted from, is that correct?

A. I can state what was said over the megaphones and I know that there was a lot of shouting going on. What any particular defendant shouted at this point, I don't know.

Q. I am asking you only about the period before Captain McAllister made his request for the meeting to disperse, you cannot recall any shouting by any defendant or, in fact, [fol. 51] you cannot recall any specific shouting by anyone at any particular location before that time?

The Court: He hasn't testified to that, but what he said was that he heard shouting, from the group in front of the persons with the mikes, is that correct?

The Witness: Yes.

The Court: He says he is unable to tell you which particular defendant participated in this shouting and, furthermore, he says because of the loud amplification of the speakers over these mikes, or whatever they are called, he was unable to distinguish exactly what was said in this so-called shouting. Is that your testimony?

The Witness: Yes, your Honor.

Q. This so-called shouting was, as his Honor has reviewed the matter, emanated from where? What was the location of the people whom you are testifying were doing the shouting?

A. They were both on the Square in front of the steps and on the streets outside of the sidewalk. They were all around there.

Q. You do not know what they were shouting?

Mr. Metzger: Objection as repetitious.

The Court: I will take it.

The Witness: I don't know what they were shouting.

[fol. 52] Q. Where were you standing?

The Court: When you say you don't know exactly what they were shouting, were there some parts of the shouting that you were able to distinguish?

The Witness: No, your Honor.

Q. Where were you standing, detective?

A. I was not standing static during this whole time. I was moving.

Q. When you were hearing this so-called shouting, where were you standing?

A. In the middle of the demonstrators.

Q. In the midst of Duffy Square—in the midst of the group to the south of the statue?

A. Sometimes, and sometimes on the steps.

Miss Dembitz: I think that's all.

Mr. Metzger: One last question before this witness steps down.

Redirect examination.

By Mr. Metzger:

Q. You testified before, in response to the counsel for the defendant's question, what disorderly acts you saw. You mentioned something about the defendant Maher. You said you saw him strike a horse with a placard rolled up, is that correct?

[fol. 53] A. That's correct.

Q. I show you a picture and ask you if you can identify anyone in this picture.

A. I see the defendant Albert Maher holding a rolled up placard sign in juxtaposition to a horse.

Q. Do you recognize this as Maher?

A. I do.

Q. It's the back of his head.

A. I do.

Q. Have you seen Maher prior to the 8th day of August of this year?

A. I have.

Mr. Metzger: This is offered, your Honor, as People's Exhibit four against the defendant Albert Maher at this time.

Miss Dembitz: We object to the admission of this picture and to the—I ask that the detective's testimony about it be stricken. The conduct of Mr. Maher after the order to break up the meeting was given and in the course of these arrests is not relevant to the charges of disorderly conduct that have been made here and we think it's highly prejudicial and confusing to the issues and should be excluded.

The Court: Is that all the testimony you have with [fol. 54] reference to the picture?

Mr. Metzger: I am just offering—

The Court: Counsel is objecting to it.

Mr. Metzger: She is objecting, as I understand it, on the basis of anything that happened after the—

The Court: I heard it, but I am not concerned with that. I am concerned with the admissibility, first of all, of this picture.

Mr. Metzger: I would ask the officer whether or not that was a fair representation of what he saw on that day?

The Witness: It is.

Mr. Metzger: That is the basis.

The Court: Show it to counsel.

Miss Dembitz: I had no knowledge of whether this is a fair representation or not. I would have to consult with my clients.

The Court: This is only offered with reference to defendant Maher.

Mr. Metzger: Only.

Miss Dembitz: Furthermore, I would say that this picture does not show what the detective has testified that it does show.

Mr. Metzger: I haven't asked the detective testimony [fol. 55] as to what the picture itself shows.

Miss Dembitz: I would also say that this picture should not be admissible under any circumstances because all that is shown of the supposed defendant is the back of his head and I would challenge the possibility of identifying the defendant from this.

The Court: I will permit you to confer with your client. Show him the picture.

Mr. Metzger: I would like to say one thing at this point. I would join in the defendant's motion by way of her objection that the officer's testimony that what was going on in the picture be stricken. I only asked him if he recognized the individual. I do not wish to offer his testimony as to what was going on in the picture; only if he recognized the individual. He testified prior to that that he saw Mr. Maher do certain things. This has nothing to do with the picture. I am offering the picture now and asking the officer to identify the time, place and subject without going into the circumstances.

Miss Dembitz: As far as the identification of the defendant is concerned, we are willing to concede that this back of the head is this defendant. Otherwise we object in all respects to the introduction of this photograph.

[fol. 56] Mr. Metzger: The back of the head, you are indicating the man holding the placards, is that right?

Miss Dembitz: Yes.

Mr. Metzger: At this time this is offered as People's Exhibit four in evidence against the defendant Maher.

The Court: Mark it in evidence.

Miss Dembitz: Your Honor, if this is being admitted in evidence, I would have to ask one or two more questions—perhaps not. I withdraw that.

Mr. Metzger: I have no further questions of Det. Behr at this time.

Mr. Lynn: No questions.

Mr. Metzger: As I understand it, it's stipulated by the defense that the person holding the placard is, in fact, Albert Maher, one of the defendants in this case?

Miss Johnson: Not stipulating, just admitting that it is.

Miss Dembitz: No further questions, your Honor.

The Court: With reference to People's Exhibit Two in Evidence, there is a picture there of things you described of what you called "mikes".

[fol. 57] The Witness: Battery-powered megaphones, your Honor.

The Court: When speaking was going on with the use of those megaphones, how was the amplification, low, moderate, or loud?

The Witness: I would say loud.

The Court: All right. Step down.

* * * * * * *

[fol. 58] Ptl. Francis Koopman, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.

The Witness: Ptl. Francis Koopman, shield 22472, Bureau of Special Services.

Direct examination.

By Mr. Metzger:

Q. Officer Koopman, you were at Duffy Square at between three and 4:30 P.M., 8th day of August last, is that not correct?

A. Correct, sir.

Q. At that time did you make any electronic recordings of any of the events at that time and place?

A. Yes, sir, I did.

Q. What time did you start making recordings and what

[fol. 59] particular incident?

A. Well, I started at about 4:00 P.M. making a tape of the speeches that were being made in Duffy Square.

Q. Specifically that was a wire, was it not?

A. Yes, sir, it was a miniphone wire recorder.

Q. Is that the miniphone you have here present in court?

A. Yes, sir, and the wire is inside it.

Q. After finishing using the wire, what did you do with it?

A. I brought it back to my office and put it on tape.

Q. You transposed the sound from the wire to a tape?

A. That's correct.

Q. Have you got the original wire here?

A. Yes, sir, it's right here inside the miniphone.

Q. Has the tape that you made been, since the 8th of August, continuously in your custody and under your control?

A. Absolutely.

Q. Officer Koopman, the reproductions of sound which would be found on the plastic tape, which you indicated, are they faithful, accurate reproductions of the sounds here on the wire and have you heard both?

A. Yes.

[fol. 60] Q. Have you listened to both?

A. Just listened to them during the meal break.

Q. Did you listen to them prior to today?

A. Yes.

Q. Does the plastic tape faithfully represent the sounds you heard on the wire?

A. Yes, sir.

Mr. Metzger: At this time I offer in evidence the wire in the miniphone and further, then, to play the plastic tape reproduction of the sounds contained on that wire.

This is offered for the purpose of establishing the use of certain instruments and the presence of certain people only.

Miss Dembitz: We object to the playing of this recording. We think it's prejudicial. There is no issue here of whether speeches were made and a playing of this recording is beside the issue. We believe that this type of evidence is just the kind that we fear might confuse the issues in this case, and from the standpoint of the disorderly conduct charges, we object to its use. We also object to the basis that this is not the best evidence of the events that occurred. We do not believe that this transcription on to the wire and then on to the tape— [fol. 61] there may be errors in the transmission and in the recording.

Mr. Lynn: Objection, further, for Laub and Copeland upon the ground that a proper foundation has not been laid for the introduction of this matter into evidence.

The Court: Objection overruled.

Mr. Lynn: Exception.

Mr. Metzger: Before the tape is played, I would like to ask Officer Koopman a few other questions.

By Mr. Metzger:

Q. Would you tell the court, officer, whose voices are to be heard on the tape that will be played now?

A. The first voice you will hear will be Levi Laub who introduces Philip Luce, who was the chairman of that particular meeting that day. Philip Luce is interrupted and Levi Laub comes back on. Then he re-introduces Philip Luce, who introduces Vincent Copeland, and after Copeland, Laub comes back on again.

Mr. Lynn: I object at this time and ask that that testimony about who comes on be stricken upon the ground that there has been no foundation laid.

Mr. Metzger: I am about to do that subject to connection.

The Court: Objection overruled.
Mr. Lynn: Exception.

[fol. 62] By Mr. Metzger:

Q. Prior to the 8th of August, have you ever heard the voices of any of the men you just mentioned?
A. Yes, sir.
Q. Which are the men that you have heard?
A. Levi Laub and Philip Luce.
Q. How about Vincent Copeland?
A. I can't recall right now having attended any meeting where Vincent Copeland spoke before, although I have heard him speaking in conversation.
Q. Do you know the identities of these people at the time you were making the recordings?
A. Yes, sir.
Q. Did you see each of them speak at the time that you were making these recordings?
A. Yes, sir.
Q. And do you recall what they were saying?
A. Yes, sir.
Q. From that, can you identify each of these voices both from your prior familiarity with the sounds and from your recollection of the statements that were made in your presence?
A. Yes, sir.

Mr. Lynn: Objection to introducing that in evidence [fol. 63] on the ground that the officer says he recalls what they said and that's the best evidence. This is secondary evidence and since he recalls what they said it's not necessary to introduce this. It is improper.
The Court: Objection overruled.
Mr. Lynn: Exception.
The Court: First of all, let's get the things in evidence.
Mr. Metzger: I would ask that the tape—I ask that this not be removed from the miniphone—this spool of wire tape that costs approximately $40. I ask that this be deemed People Exhibit five in evidence.
The Court: Which one are you introducing now?

Mr. Metzger: The wire which is now in the miniphone.

The Court: The wire, you are asking to have that introduced as People's Exhibit five?

Mr. Metzger: Right. I ask that it be deemed marked.

Miss Johnson: May I ask a question? Are you planning to play the wire or the tape?

Mr. Metzger: Not the wire.

Miss Johnson: Then I object to the wire being introduced at all.

The Court: It's preliminary against—to introducing the tape.

[fol. 64] Mr. Lynn: If the Court please, it's only the officer's word that this wire is the same as the tape. The only way that can be determined is to play the wire and the tape. We can't cross-examine the wire.

The Court: Objection overruled.

Mr. Lynn: Exception.

The Court: People's Exhibit five, deemed marked. That's the wire?

Mr. Metzger: Yes, sir. The next offer, as People's Exhibit six is the plastic tape now on the recording machine, and further ask that be deemed People's Exhibit six.

The Court: Deemed marked People's Exhibit six.

Mr. Metzger: Before this is played, I want to make it clear that it is not offered with any idea as to the actual contents of the speech. Nothing that these people said, specifically, in speeches that the People seek to charge them with any crime. It has to do with being located and using certain electronic devices in violation of law and having received notice that this was a violation of law and their demonstration at a certain point becoming such that it created a disturbance.

Miss Dembitz: Mr. Metzger, is it your position that this evidence you are introducing—you are not introducing [fol. 65] this in support of the disorderly conduct charge, but only in support of the violation of the Administrative Code.

Mr. Metzger: This is offered—

Miss Dembitz: I don't understand your last statement.

Mr. Metzger: I didn't say anything. This is offered, as I said, first to prove the use of certain devices. Secondly, to locate individuals at a given time in a given place and with respect to locating individuals, particularly Mr. Laub and Mr. Copeland and Mr. Maher and whoever else is on this tape—not Mr. Maher. Any individuals on the tape. This would put them at the scene so-called of the crime. That's the purpose with respect to 722.

Mr. Lynn: If the purpose is to put them at the scene, we have already identified them in photographs which put them at the scene and we stipulated that they were at the scene at that time, if that's the purpose he is offering it for. He said he had no objection for offering it for the content of what they were saying. It's simply to put them at the location and to prove they were using certain equipment, if we have already admitted that, and there [fol. 66] are pictures in evidence, where the megaphones are being held by these individuals, the pictures showing that they were there, this would be only for prejudicial purposes, if that's the only purpose he is offering it for.

The Court: Objection overruled.

Mr. Lynn: Exception.

Mr. Metzger: Go ahead, officer.

Tape Recorder: Under the auspices of the May 2nd movement—

The Witness: Levi Laub.

Tape Recorder: We are here to have a peaceful meeting, exercising our right of peaceful purpose and peaceful assembly—(voice interrupting, unintelligible)

Miss Johnson: Your Honor, I must renew my objection. This recording is not in a form—aside from all of our other objections—is not in a form where the voices are identifiable.

Mr. Metzger: He identified the first speaker as being Mr. Laub.

Mr. Lynn: I object to him identifying as this is played.

The Court: Objection overruled.

Tape Recorder: This demonstration has been called, [fol. 67] not a demonstration, we can call it that. This is a peaceful meeting. Here are the speakers protesting United States war against the people of Viet Nam. The war nurtured by our Government. The war carried on for ten years against the people of South Viet Nam and our Government is carrying against the people of South East Asia. I would like at this time to present Philip Luce of the May 2nd movement who will tell you something about the May 2nd movement and will act as the chairman of this meeting and introduce the other speakers. Philip Luce. (sounds of hands clapping)

The May 2nd movement is a movement conceived (inaudible) composed of many different ideologies and beliefs. The major purpose of the May 2nd movement is a movement (inaudible voice interrupting) we call this rally today to have different speakers give their views on the issues of vital importance to all Americans, that issue being the war in Viet Nam. We are going to carry on this meeting peacefully. We are exercising—

The Witness: Levi Laub.

Tape Recorder: We are exercising our constitutional right of assembly. We do not need permission from the police department of New York to exercise our constitu-[fol. 68] tional rights. We are going to continue this peaceful meeting.

Mr. Metzger: Hold it. Let me ask you something. You were present near Mr. Laub at this point?

The Witness: Standing directly in front of him.

Mr. Lynn: The form of the question is leading.

The Court: Will you rise when you address the Court?

Mr. Lynn: The form is leading. He suggested to the witness the answer.

The Court: Objection overruled.

Mr. Lynn: Exception.

Mr. Metzger: At what point was there any conversation between Mr. Laub or any of the other two men standing there and any police officials?

The Witness: Just before Mr. Laub made this statement that you heard him say on the tape here, about they were going to continue with their demonstration. He was approached by an Inspector Ralph Lewis of the Third Division and Captain McAllister of the Police Department, and they were speaking. You couldn't hear it because of the background noise.

Mr. Metzger: Continue on with the tape.

The Witness: Philip Luce.

[fol. 69] Tape Recorder: The first speaker will be Vincent Copeland. I want to welcome you all to Times Square where you are supposed to be able to exercise your constitutional rights of assembly and free speech that they are trying to deny us right now. I don't think they are going to succeed if everybody stands forth and stays here and listens to what the speakers have to say and protest to the utmost against the cries against the working people of North and South Viet Nam by American imperialism. (Clapping sounds) They (inaudible) I have been reading in the paper the last four or five or ten weeks that Goldwater, or whatever his name is, Goldwater has an itchy trigger finger. That itchy trigger finger has been replaced by the bloody hand of Johnson.

The Witness: At this point they are approached by the police again.

Mr. Metzger: You say something happened at this point?

The Witness: Yes, sir.

Mr. Metzger: What happened?

The Witness: Inspector Lewis and Captain McAllister again approached Mr. Copeland and Mr. Laub.

Mr. Lynn: I object to the volunteering of a description [fol. 70] here without any questions.

The Court: Objection overruled.

Mr. Lynn: Exception.

Tape Recorder: I represent the people. We built this Square here. We have a right.

The Witness: Vincent Copeland.

Tape Recorder: (Sounds of shouting and chanting—inaudible)

Mr. Lynn: I object to any further playing of this recording because it is not relevant to the issues of this case.

The Court: Objection overruled.

Tape Recorder: (Many voices in unison) Let him speak. Let him speak. Let him speak.

Mr. Metzger: What's the noise in the background, officer. What's that rhythmic noise.

The Witness: It's a big kettle drum being played.

Tape Recorder: (Voices in unison) Let him speak.

The Witness: Levi Laub.

Tape Recorder: Ladies and gentlemen, I want you to hear this very well. I have just been informed by the police captain on my left—I guess he should be on my right—he is not going to allow us to stand here and carry on a peaceful demonstration. He has informed me that all [fol. 71] those of us who continue to stand here will be arrested. We are going to stand here and continue this peaceful demonstration. They want to take away our civil rights (inaudible). Look what they are doing over there. Look at this. (Inaudible)

Mr. Lynn: I object unless the officer identifies what was going on during the last playing of the recording.

The Court: You have no objection to that?

Mr. Metzger: No.

The Court: Will you tell us what was going on?

The Witness: Yes, sir. Immediately after Mr. Laub got up and made this last statement, that he had been informed to move by the captain, and that he was requesting everybody to stay there, the captain directed the ten patrolmen and one sergeant, who were across the street, to come over and disperse the crowd and also the two officers on horses and they came to the crowd from the Seventh Avenue side and they started telling everybody to disperse and at that time—then the horses came on behind the foot patrolmen and then Mr. Maher ran past me and ran over to one of the horses and started smacking it with some

kind of a sign, or something. I don't know what he was hitting it with. That's when everybody started shouting [fol. 72] and yelling and running.

Mr. Metzger: I have no further questions of this officer, Koopman.

Cross-examination.

By Miss Dembitz:

Q. Officer Koopman, at what time did you testify you approached Duffy Square? I don't recall.

A. I was in Duffy Square from about—well we were—we first got to Sixth Avenue and 45th Street. We saw Levi Laub and two other fellows driving along Sixth Avenue in the car.

Mr. Metzger: I object to this.

The Witness: This was 3:35.

Mr. Metzger: This really isn't within the scope of the direct and therefore not within the scope of cross-examination. If we are going to go through all the events —all I have done with respect to officer Koopman is ask whether he made a recording, trying to qualify and lay a foundation for the playing of that recording. It's offered for a very limited purpose and that is all. I haven't asked him what he observed other than during the moment where there was an interruption in the recording. If the defense wishes to use him as a witness to tell what happened dur- [fol. 73] ing the whole day, I believe that he should be called as their witness.

The Court: Objection overruled.

By Miss Dembitz:

Q. Officer Koopman, you came to Duffy Square prior to the beginning of this meeting, is that a fact?

A. Yes, Ma'am.

Q. And you heard the recording we all heard and you testified that you heard the speeches and were at the scene when the recording was made?

A. That's correct.

Q. Is it true or is it false that while these speeches were being made they were clearly audible and there was no shouting in the assemblage that was listening to the speeches?

Mr. Metzger: I object to the form of the question.

Miss Dembitz: On cross-examination, your Honor, I believe it's allowable to try to probe into the matter.

Mr. Metzger: It's the form of the question, "is it true or false," is assuming—

The Court: There is no jury here. I will take it.

Mr. Metzger: I withdraw the objection.

[fol. 74] The Court: Objection overruled.

Miss Dembitz: I will repeat the question.

The Court: You don't have to repeat it. I overruled the objection. He may answer.

Miss Dembitz: But, your Honor, I think the detective isn't quite sure what the question was anymore.

The Court: You want to restate it, go ahead.

Q. Can you answer the question?

A. All right, I will try and answer you the best I can as to what I think you are trying to ask.

Q. I prefer to restate the question. You have heard the recording of the speeches made by Mr. Laub, Mr. Luce, and Mr. Copeland?

A. That's correct.

Q. And you were present at the scene and heard the speeches being made?

A. Right.

Q. Is it true that during these speeches, the speeches were clearly audible and that there was no shouting of such proportion that it interfered with the audibility of these speeches?

Mr. Metzger: I object to this. This is not a proper question. This is a general question, "Was it audible? Could [fol. 75] it be heard?" How can this officer say it is audible. Is it audible to him or someone of Fifth Avenue?

Miss Dembitz: Was it audible to him and was it audible at the time he made this recording and was it audible on the recording.

Mr. Metzger: The recording speaks for itself.

The Court: You were permitted to have him interrupt the recording two or three times to make certain observations. So this also applies to the defendant. They should have the same right.

Mr. Metzger: The form of the question—

The Court: That's another proposition. If we are talking about the form, it's another proposition. You are objecting to the question as to form. The objection is sustained.

By Miss Dembitz:

Q. During the giving of these speeches, did you hear any shouting in the assemblage that was gathered to the south of Duffy Square, on Duffy Square, to the south of the speakers?

A. There was a great amount of shouting and yelling.

Q. Was that shouting audible on this?

The Court: May I make this suggestion. You are right [fol. 76] on top of the witness, which is perfectly all right with me. I can hear him, but he is inclined to talk to you, which is a natural thing. The defendants are also entitled to hear what he has to say, so if you stand back a little bit, he will project his voice so everybody can hear him.

Q. Detective Koopman, you have said this is an accurate recording of the sounds that were audible from the steps on Duffy Square; is that correct?

A. That's right.

Q. Does this recording of the speeches indicate or show that there was shouting in the assemblage at the time the speeches were being given?

A. Well, you heard almost two minutes of "Let him speak".

The Court: Answer the question.
The Witness: Yes.

Q. Prior to the statement, "Let him speak," was there shouting in the assemblage that was gathered before the speakers—to the south of the speakers?

A. Yes.

Q. Is that audible on this recording?

A. Yes.

Q. The speeches were plainly audible, were they not?

[fol. 77] A. I was standing directly in front of the speakers, Ma'am, and they were using battery-powered megaphones. I have a very good recording device that picks up perfectly and sound.

Q. I am not asking you about the speeches. I am asking you about the fact that whether the speeches were plainly audible and what the crowd, the assemblage, was doing before Captain McAllister addressed Mr. Laub. That's what I am directing your attention to.

A. The speeches were perfectly audible to me where I was standing.

Q. One other point I want to go into with you, Det. Koopman, which I think was brought out on direct examination. You said that approximately ten or fifteen officers were present, is that correct?

A. There were on the other side of Seventh Avenue, I believe. There were on the—on 47th Street and Seventh Avenue.

Q. They came on to the Square, is that correct?

A. Yes.

Q. Now, you have testified that there were two policemen on horseback on the Square, is that correct?

A. Yes.

Q. Would you please describe where these horses were and what they did?

[fol. 78] Mr. Metzger: I am going to renew my objection at this time. This testimony about these officers and the horses and everything else was brought out on cross-

examination. The defense counsel has made believe that this was direct testimony when it wasn't. It was testimony elicited by herself. I object again.

Miss Dembitz: Your Honor, I believe that on direct examination Mr. Metzger asked the witness something about a rolled-up placard and some gestures at the horse and I therefore believe, your Honor, that this question of the horses and their use and their location is pertinent.

The Court: Your objection is overruled.

Q. Please answer the question. Where did the horses come from? Where did they stand on the Square? What did they do on the Square?

A. The horses came from 47th Street. They were on the same side of the street and where the police officers were, Seventh Avenue and 47th Street. After Mr. Laub refused to ask his people to leave the Square, Captain McAllister had his men come over and the two horsemen were behind the ten footmen. When the footmen came up on to the Square, people started running around and jumping out into the street and after all ten men trying to hold two hun-[fol. 79] dred people is pretty difficult. The two horses came on directly behind the ten patrolmen.

Q. Where were the horses located when they came on to the Square? Where did they go on the Square?

A. Directly between that statue of Father Duffy and that south—that little island on the south end.

Q. Were the horses stationary? Did they come on to this location and stand there immobile or did they move around? The horses came off of this part of the Square, is that correct?

A. They came from here.

Q. They came from here and proceeded to here?

A. If I may show you, Ma'am, they were over here on 47th Street. They came along here and up on to the Square here.

Mr. Metzger: Indicating entering the Square at about the grating.

Q. About the middle of the grating?

A. Right.

Q. Is it on this grating that the meeting was being held prior to the time the horses came there?

A. Some of the people were on the grating, yes.

Q. The speakers were on the steps, is that correct?

A. Yes.

[fol. 80] Q. And the meeting was being held on the grating, is that correct?

A. All over there.

Q. In this area?

A. Yes.

Q. You say that the horses proceeded up on to the pavement and on to the grating, is that correct?

A. That's correct.

Q. What did the horses do when they got—what did the officers do with the horses when they got on the grating? Did they stand on the grating or did they move around?

A. They moved them around. They make the horses—I can't explain it.

Q. Try.

A. They make the horses like turn in a circle.

Q. The horses were going in circles around the grating?

A. No, the horses stand like this and they twist them around.

Mr. Metzger: Indicating a pivot.

Q. Did the horses walk around this area?

A. Yes.

Q. They did?

A. Yes.

Q. Officer Koopman, what were your orders when you [fol. 81] went to Duffy Square?

Mr. Metzger: Objection.

The Court: Sustained.

Miss Dembitz: I think that's all, your Honor. Thank you.

The Court: Any other questions.
Mr. Lynn: No questions.
The Court: Step down.

PTL. JOSEPH MCNULTY (Recalled)

Direct examination.

By Mr. Metzger:

Q. Officer McNulty, you are assigned to the 16th Precinct, is that not correct?
A. Yes, sir.
Q. You were assigned or sent to the area of Duffy Square on the afternoon of the Eighth day of August last, is that not correct?
A. Yes, sir.
Q. You were in uniform?
A. Yes, sir.
Q. Who did you arrest?
A. The defendant Fred Jerome and Pierre Meisner.
Q. Fred Jerome and Pierre Meisner. Which of the two defendants did you first observe?
[fol. 82] A. Pierre Meisner.
Q. Tell the court, please, exactly what you saw Meisner do from the time you first observed him until the time that you placed him under arrest. Before you do that, however, point out Mr. Meisner to the court.
A. The second from the left in the first row.
Q. The fellow next to the man that's sleeping?
A. No, the second from the right.

The Court: Stand up, please. Is this the man you are talking about?
The Witness: I believe so. He didn't have glasses on that day.
The Court: Indicating the defendant Meisner.

Q. Tell the court, please, what Mr. Meisner did from the time you first observed him until the time you placed him under arrest.

A. Mr. Meisner was running around Duffy Square Park calling to others, shouting that they did not have to leave; that they could stay.

Q. This was after there was some conversation between some of this group and the Captain and Inspector at that time?

A. Yes, the Captain had conversation—

Q. This was after the conversation?

A. Yes.

[fol. 83] Q. You say he was running around and shouting. Continue on.

A. He was shouting on these others that they didn't have to leave; they had the right to speak; it was their constitutional rights and similar words to that effect. I went up to Mr. Meisner.

Q. Where was he at this time?

A. On the west side of Duffy Square Park.

Q. I showed you a picture of Duffy Square Park marked People's Exhibit one and ask you to point out with this pen, for the Court, so that the Court may see where the area is you are talking about.

A. The time I spoke to him, or the first time I saw him?

Q. The time you spoke to him, where was he?

A. Approximately here.

Mr. Metzger: Indicating the south end of the fenced-off area, where the statue is.

Miss Johnson: Can we see that, please?

Mr. Metzger: Right here.

Miss Johnson: All right.

Q. What was your conversation with Meisner and what was the result?

A. I told Mr. Meisner that he must keep moving and [fol. 84] not to try to encourage these people to stay any longer. He continued to shout that this is America.

Q. Wait a minute. Let me ask you one thing. Is this on the sidewalk or to the Square part?

A. This was on the sidewalk.

Q. He continued to shout and then what happened?

A. I placed the defendant under arrest.

Q. Did anything happen after that with respect to that defendant?

A. No, sir.

Q. Let me ask you a question. I show you a couple of pictures. I show you one picture and ask you whether you recognize anyone in that picture.

A. This Pierre Meisner here.

Miss Dembitz: We are willing to stipulate that Mr. Meisner was at the location of the scene.

Mr. Metzger: I withdraw the offer.

Q. What about Fred Jerome, Officer McNulty? Will you tell us what you observed him do?

A. Mr. Jerome was carrying an American flag on a wooden pole and he was running from one group to another around the park and the mounted man on a horse was attempting to disperse the groups of people that were there.

The Court: You observed the defendant Jerome carrying the American flag on a pole and go running from one group [fol. 85] to another, is that correct?

The Witness: Yes.

The Court: Proceed from that point. What happened after that?

The Witness: There was a mounted patrolman attempting to disperse these groups of people. As the mounted patrolman would disperse a group, the defendant Jerome, with the flag, would run behind the horse and call to others. I approached the defendant and I ordered him to move away.

Q. Where was he located at this time?

A. At the north side of the statue, on the steps.

Q. Go ahead.

A. Mr. Jerome just looked at me and he smiled and at that time I told him if he didn't keep moving I would place him under arerst. He said, "No".

Q. By the way, let me interrupt. Would you point to Mr. Jerome?

A. The gentleman sitting on the extreme right in the first row.

Mr. Metzger: Will you stand up? Is that Mr. Jerome, the gentleman standing?

The Witness: Yes.

Q. Go ahead. You told him to move and if he didn't [fol. 86] move you would place him under arrest. Then what happened?

A. The defendant just smiled and said, "No". At that time I placed him under arrest.

The Court: When he was running from one group to another, what was he saying, if anything?

The Witness: The exact words, I don't know.

The Court: I am not asking you the exact words. Give us the substance.

The Witness: That they had all the right in the world to have their meeting; that we, the Fascist police had no right to stop them.

The Court: What was the tone of his voice?

The Witness: He was shouting.

Q. At the time you had your conversation, you said he was at the north end of the stairs. Where would you estimate, with respect to the width of this cement area here, that is to say with respect to the sidewalks, could you point out where he was?

A. He was on the stairs here.

Q. Which part of the stairs? Point to the exact place, if you can remember.

A. You can't see it. There is a shadow there.

Q. Within that shadow?

A. Yes.

[fol. 87] Q. Is that the extent of your observations of the defendant Jerome?

A. Yes.

Mr. Metzger: Will the defendant stipulate that the defendant Jerome was at the scene at the time?

Miss Dembitz: Yes.

Mr. Metzger: You may examine.

Cross examination.

By Miss Johnson:

Q. Officer McNulty, when did you arrive? What approximate time did you arrive at the scene?

A. 4:00 or 4:05.

Q. At that time did you arrive with other officers?

A. Yes, I did.

Q. Were you given instructions—withdrawn.

At the time you came to Duffy Square, were there speeches being made by any of the defendants?

A. Not that I observed at that time, no.

Q. Was anything being said by any of the defendants at that time?

Mr. Metzger: Objection to the form.

The Court: Objection overruled.

Mr. Metzger: May I say this, that the witness is being called upon to testify whether or not anyone was saying [fol. 88] anything without regard as to whether he heard it and he said "no", nothing was being said, and it's later proved that something was said.

Q. Did you hear any of the defendants addressing the crowd or saying anything when you came on to the island?

The Court: When you first got there.

The Witness: I can't answer that yes or no.

Q. You weren't in the courtroom when the tape recording was played?

A. No, I was not.

Q. Right after you got on the island, or how soon after you got on the island, did you begin dispersing the crowd?

A. Fifteen or twenty minutes later.

Q. You stood on the island for fifteen minutes before you began to disperse the crowd?

A. Yes.

Q. Did you observe any speeches being made in that fifteen minutes?

A. Yes.

Miss Dembitz: Just for clarification, I don't believe it was entirely clear on the record where Mr. Meisner was standing when he was arrested. I believe that you pointed [fol. 89] to a location that appeared to me to be on the southern steps, is that correct?

The Witness: No.

By Miss Dembitz:

Q. Where was he standing at the time you arrested him?

A. On the west side of the statue toward the south of the steps. Not on the southern steps, on the western side. He wasn't on the steps.

Q. To the south of the statue?

A. No.

Q. To the west?

A. To the west of the statue.

Mr. Metzger: You want to point it out on the picture? It will expedite matters.

Miss Dembitz: Point it out again.

The Court: Showing on People's Exhibit one.

Mr. Metzger: Indicating the sidewalk.

Miss Dembitz: Indicating the sidewalk slightly above the—slightly to the north of the steps and to the west of the steps. Now, Your Honor, I don't want to repeat with every witness a question that you have sustained an objection to, but I would like to state for the record that I believe it would be proper, and I would address to each wit-

ness, the question, "What were your orders when you went to Duffy Square".

[fol. 90] The Court: The Court will make the same ruling. The objection to that question is sustained and an exception to the defendant.

Miss Dembitz: I would like the record to show that I would direct the same question to each officer except that you have sustained the objection to it.

One further question.

You said that Mr. Jerome went from one group to another. Were these groups—where were these groups located.

The Witness: To the south of the statue.

Miss Dembitz: No further questions.

Mr. Metzger: Step down, Officer.

Mr. Lynn: No questions, Your Honor.

Ptl. Herbert Engelhardt, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.

The Witness: Ptl. Herbert Engelhardt, shield 9137, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Officer Engelhardt, August 8, 1964, in the afternoon, around 4:00 P.M., were you in uniform in the vicinity of [fol. 91] Duffy Square, County of New York?

A. I was, yes.

Q. Who did you arrest at that time and place?

A. Ellen Shallit and Joyce Chadwick.

Q. Point out Ellen Shallit to the Court, please?

Miss Dembitz: Ellen Shallit has just left the courtroom for a moment. Could you start on the other?

Mr. Metzger: That was at the defense request, I assume?

Miss Dembitz: Yes.

Mr. Metzger: Point out Joyce Chadwick, please.

The Witness: Sitting there in the blue dress.

The Court: In the front row?

The Witness: Yes.

The Court: With the glasses?

The Witness: Yes.

The Court: Indicating the defendant Joyce Chadwick.

The Witness: That's Ellen Shallit over there next to her.

Mr. Metzger: Those two individuals stand up so we can see who they are?

The Court: All right.

By Mr. Metzger:

Q. With respect to Joyce Chadwick, would you say when [fol. 92] you first saw this defendant and what you observed this defendant do? Everything you saw and heard up to the moment of arrest?

A. When I first observed Joyce Chadwick, it was with a defendant Kunis. She was with Kunis when Kunis laid down and ran into the street and when the officers went to remove him she was hollering "Leave him alone facists".

Q. Where was she standing when she was doing this?

A. At the time she was standing on the sidewalk.

Q. Then what happened?

A. She sat down on the sidewalk herself. I went over to her and told her—

Miss Dembitz: I object to this line of testimony. There is no charge here of resisting arrest. This is entirely irrelevant to the issues of this case which relate to the assemblage and the reason why the order to move on was given. This is irrelevant to the charge of—to the allegations as to why the police told this group to move on since this happened subsequent to that order.

The Court: Objection overruled.

Q. She was standing on the sidewalk yelling out and you went up to her and told her to move on, is that right?

A. Yes.

[fol. 93] Q. She sat down?

A. Yes.

Q. What happened?

A. I told her if she would not get up and move, she would be arrested. She refused. I told her again, and she still refused. I went to pick her up myself and she started punching me and went to bite me. Another officer helped me and we put her into a patrol car and took her into a station house.

Q. This whole thing took place on the sidewalk?

A. Yes.

Q. I show you People's Exhibit one. This is a picture of Duffy Square, and show us where this took place; tell the court.

A. Right here.

Q. Indicating to the south end of the enclosed area right on the sidewalk near the street. Now, with respect to the defendant Shallit, would you say to the Court, please, what she was doing when you first observed her; all your subsequent observations up through and including the time you placed her under arrest.

A. I first observed her she was carrying a placard. I don't recall what was on it. She was shouting remarks about "Do not leave here. We don't have to move. Nobody [fol. 94] can move us. Don't give up". She was moving all over the area.

Q. What area?

A. All over Duffy Square, calling to the people who were moving around, "Come back. We have our rights. Don't give in to the police. They are fascists. They have no rights". I lost sight of her a few minutes. I then saw her again in front of about five people. She was actually doing most of the shoving and pushing back at one of the officers. I don't recall who it was. He took her and placed her in another car. I didn't accompany her because—

Q. Let's get down to the point where you saw her pushing. Where was this?

A. Can I have the picture? It was right over here.

Q. Indicating approximately the middle of the cement area at the extreme end of the south end of the grating,

where the pigeons are in this picture. What was she doing this second time you saw her?

A. She was with a group of other people. She was doing most of the shouting. Some of the police officers were trying to move the people back and she was shoving back at the police officers.

Q. Did you see her shove a police officer?

A. Yes.

[fol. 95] Mr. Metzger: Do you stipulate that Ellen Shallit was at the scene?

Miss Dembitz. Yes.

Mr. Metzger: And the defendant Chadwick also?

Miss Dembitz: Yes.

Mr. Metzger: You may examine.

The Court: You didn't place Miss Shallit under arrest yourself, did you?

The Witness: I did, but when I went to the car, there was no room for me.

The Court: I haven't heard that testimony yet.

Mr. Metzger: I thought he said it. When you saw Miss Shallit shoving an officer, what did you do?

The Witness: I told her she was under arrest and walked her over to a police car.

The Court: You mean you physically didn't take her to the police station?

The Witness: Myself, no.

The Court: You placed her under arrest?

The Witness: Yes.

Mr. Metzger: Okay.

Cross examination.

By Miss Johnson:

Q. Officer Engelhardt, when you first observed Miss [fol. 96] Shallit, that was after the time that the crowd had been advised that they were going to disperse?

A. The first time I observed her?

Mr. Metzger: I think to expedite matters, the People could stipulate that all the arrests in this case were made

after at a time after the defendants Laub and others were told on two occasions close to each other that they could no longer hold the demonstration there. I am willing to stipulate that.

Miss Johnson: I would be willing to stipulate too that they were arrested after they were told to disperse. My question is, when he first observed the defendant Shallit, was that at a point after the crowd had been told to disperse?

The Witness: When I first saw her, she was carrying a placard before they were told to move on.

Q. Your testimony was that when you first observed Miss Shallit, she was—

A. Carrying a placard.

Q. And she was all over the area telling people they did not have to move on?

A. She was carrying a placard.

The Court: He has answered that. The first time he observed her—

[fol. 97] Miss Johnson: You also testified that she was going all over the area.

Mr. Metzger: Wait a minute.

The Court: Let's have one question at a time. The first question is, "When did you see the defendant shout for the first time and what if anything was she doing?"

The Witness: When I first saw her shout, it was after they were told to move on. We were trying to disperse the crowd.

Miss Johnson: I am not asking when you first saw her shouting.

The Court: The question was, when did you first observe Miss Shallit and what was she doing, if anything.

The Witness: I first observed her when I reached Duffy Square, she was carrying a placard.

Miss Johnson: Was she doing anything other than carrying a placard?

The Witness: At the particular time, no.

Miss Johnson: It was when you first observed her shouting, she was shouting—telling other people, presumably, that they did not have to move on. That was after the crowd was told to disperse, is that correct? The officer nodded his head in the affirmative.

[fol. 98] The Court: The stenographer can't take that down.

Miss Johnson: Would the officer please say yes or no?

The Witness: Can you repeat the question please?

The Court: You don't have to repeat it. The stenographer will repeat it.

(The last question was read by the stenographer.)

The Witness: Yes.

The Court: All right, now we have got it.

Miss Johnson: I'm sorry. I didn't ask you a question on the defendant Joyce Chadwick.

By Miss Johnson:

Q. When you first observed the defendant Joyce Chadwick, what was she doing?

A. When I first observed her, she was with a fellow, Kunis. She wasn't doing anything at that particular time until Kunis ran into the street and laid down.

Q. Where was she standing at the time you first observed her?

A. When I first observed her, on the sidewalk.

The Court: Where do you mean, Kunis ran out on the street and laid down? What did he do?

The Witness: From what I had saw, Kunis was told to move on. He did not answer. He ran out into the middle [fol. 99] of Broadway and laid down in the middle of Broadway.

Voice: I did not.

The Court: Let there be no statements from any of the defendants in open court. The defendants are to keep silent. If they have any testimony to offer, they will have full right to do that later on, a full opportunity. In the meantime, they are not to make any statements.

Where was it you say you observed this? Where did it happen? Was that on the sidewalk or in the street where the people were and ordinarily there is automobile traffic?

The Witness: It was in the street. Joyce Chadwick was on the sidewalk with pedestrian traffic.

The Court: Where was it you observed this on the part of the defendant Kunis?

The Witness: In the street where the vehicle traffic is.

The Court: Hold it. Can you tell us by looking at People's Exhibit one the approximate position where you say this happened with reference to the defendant Kunis?

Mr. Metzger: Indicating the middle of Broadway ap-
[fol. 100] proximately at the flag pole, which would be the middle of this picture, People's Exhibit one.

The Court: All right. The defendant Kunis here in court?

Voice: Here, your Honor.

The Court: Is that the gentleman you refer to?

The Witness: Yes, sir.

Miss Johnson: You are not the arresting officer?

The Witness: No.

Miss Johnson: No further questions.

Mr. Metzger: Step down.

Ptl. Andrew M. Coffey, called as a witness, on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.

The Witness: Ptl. Andrew M. Coffey, Shield 24411, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Officer Coffey, on the 8th of August, 1964, you were assigned to the area near Duffy Square in New York County, is that correct?

A. Yes, sir.
Q. You were in uniform?
[fol. 101] A. Yes, sir.
Q. You arrested who?
A. Richard Rhoads and Theodore Ostrow.
Q. Point out Richard Rhoads.
A. The fourth man in the front row here.
Q. Stand up. Is that Richard Rhoads?
A. Yes, it is.
Q. Who else?
A. Theodore Ostrow sitting right next to him.
Q. The man that is standing up now?
A. Yes, sir.
Q. First, with respect to—withdrawn.
I am going to show you two pictures, officer, and ask you whether you recognize any one in these pictures?
A. This is Ostrow and this is Rhoads.

Miss Dembitz: We will stipulate that these two defendants were there.
Mr. Metzger: I am going to offer these pictures in evidence at this time, with respect to their location on the sixteenth.
The Court: Show them to counsel.
Mr. Metzger: I ask the officer whether or not that is a fair representation of the area and the scene at the time he was there.
[fol. 102] The Witness: The pictures?
Mr. Metzger: Yes.
The Witness: Yes.
Miss Dembitz: No objection.
The Court: Mark them as People's Exhibits seven and eight.
Miss Dembitz: Let me see which is which.
The Court: We will identify them. Which one is seven?

By Mr. Metzger:

Q. I show you People's Exhibit seven and ask you who it is you recognize on there.

A. Richard Rhoads.

Q. This is the man with the tie?

A. Yes.

Q. Do you see two numbers on this picture that are inked in?

A. Number one.

Q. People's Exhibit eight?

A. Theodore Ostrow with the sun glasses and black arm band and "number one" underneath him.

Mr. Metzger: That's People's Exhibit eight.

The Court: People's Exhibit eight, which one is Ostrow?

[fol. 103] The Witness: Right here.

The Court: Indicating a man with sun glasses and a black band around his arm?

The Witness: Yes, sir.

By Mr. Metzger:

Q. Officer Coffey, first say with respect to the defendant Richard Rhoads everything you saw him doing up to and including the time of arrest?

A. First time I saw the defendant, I was helping another patrolman, Ptl. Fahy, with Arthur Kunis who had laid down in the street. I was assisting Pt. Fahy with the defendant into a cab with him. The defendant Rhoads was yelling "facist cops".

Q. Where was he yelling "facist cops"?

A. He was in Duffy Square actually on the sidewalk. It would be on—

Miss Dembitz: Your Honor, I would like—again, I don't want to repeat my objection with each witness. If I may, for the record, I would like to make a general objection to any testimony as to the occurrences after the Captain

McAllister attempted to disperse this meeting, on the grounds that they are not within the allegations of the complaint. It would be a violation of due process to try [fol. 104] people on charges which have not been alleged and which they have not had notice and are not included in the sworn complaints and on the ground that it's not relevant to the issues. If I may, your Honor, rather than burdening the court by repeating this objection, I wish it recorded with respect to this line of questioning of each witness with respect to each defendant.

The Court: The Court has already ruled on it and the court has overruled your objection with an exception to each defendant.

By Mr. Metzger:

Q. You say the defendant, Rhoads, was on the sidewalk when he was yelling out these words?

A. Yes.

Q. This is at the time you were working with Kunis?

A. Yes.

The Court: Where was Kunis?

The Witness: At the time he was in the gutter; lying down in the gutter adjacent to Duffy Square on Broadway, lying in the road, sir. Myself and Ptl. Fahy had to go over and bodily put the man—I assisted him in placing him into a cab and taking him into the station house.

Q. What happened after you finished with Kunis and [fol. 105] you saw Rhoads on the sidewalk?

A. There was a melee in Duffy Square itself and everybody was running around yelling "facist cops" and this and that and I observed Rhoads running towards the steps of the Square itself and I followed him up and told him he would have to leave the Square. If he didn't, he would have to be placed under arrest because he was part of the general disturbance there and he said he didn't want to leave and I told him if he didn't leave the second time I

was going to place him under arrest and I placed him under arrest and I took him down from the center of Duffy Square by the monument there.

Q. During the period of time that you observed him on the sidewalk and the period of time he ran up to the steps, what was he doing?

A. Creating a disturbance.

Q. Say what he was doing.

A. Yelling "facist cops".

Q. What tone of voice?

A. Very loud, almost a screeching tone of voice you could say. He was screaming at the top of his lungs.

Q. How long a period did you observe him standing on the sidewalk screaming?

A. The whole period of time it took myself and Ptl. Fahy [fol. 106] to place the other prisoner in a cab, which was approximately five minutes or so. Five or ten minutes.

Q. With respect to the defendant Ostrow, can you tell me what you were doing when you first saw him? The defendant Theodore Ostrow, what was he doing at the time you first saw that defendant?

A. Taking Richard Rhoads into a cab, Ostrow came over and told me to leave the defendant alone.

Q. This was in the street?

A. Coming off Duffy Square into the street on Seventh Avenue.

Miss Dembitz: I object, your Honor. I don't think that's a clear description. "Coming off," his last statement.

Q. Make it more clear. Where was the cab? Where were you getting into the cab, and where did the defendant Ostrow come? Where did he come from when he made this interruption?

The Court: You had the defendant Rhoads in custody?

The Witness: Yes, sir.

The Court: You placed him under arrest?

The Witness: Yes, sir.

The Court: And you were taking Rhoads to a taxicab?

[fol. 107] The Witness: Yes, sir.

The Court: And then you say that Ostrow came on the scene?

The Witness: Ostrow was already on the scene and he was in Duffy Square and as I started walking, Rhoads—Ostrow started yelling "facist cop". "Leave us alone. We are not doing nothing here," and I told him if he didn't be quiet, he would be placed under arrest also and eventually I had to put him under arrest, also.

The Court: What tone of voice?

The Witness: Very loud. He was making a lot of noise. He was screaming, sir.

Q. Was he standing in the street at the time?

A. Yes, he was.

Mr. Metzger: You may inquire, counselor.

Cross examination.

By Miss Johnson:

Q. You say you were putting the defendant in the taxicab, where were they coming?

Mr. Metzger: What was the question, where were they coming from?

Miss Johnson: He testified in both cases that the defendants placed under arrest were put into taxicabs. He could [fol. 108] describe where these taxicabs were.

The Witness: We had stopped cabs going across town, going east and west, and we asked them if they would volunteer to transport prisoners for us.

Q. Who had stopped the cabs?

A. There was a patrolman on the scene. We had prisoners and there were no patrol carriers at the time.

Q. You were commandeering cabs?

A. Yes.

Q. How many cabs stopped?

A. I don't know, I had one cab stop for me. That's all I can testify to.

Q. Were the cabs lined up on the Seventh Avenue side or the Broadway side, or what side of Duffy Square?

Mr. Metzger: I object to that.
The Court: Objection sustained.
Miss Dembitz: That's all.
Miss Johnson: No further questions.

Ptl. Henry Campbell, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.
The Witness: Ptl. Henry Campbell, shield number 19112, [fol. 109] 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Officer Campbell, on the 8th of August last, 3:30 and 4:30 P.M., were you in the vicinity of Duffy Square, County of New York?
A. Yes.

The Court: Were you in uniform?
The Witness: Yes.

Q. Did you arrest anybody at that time and place—
A. I arrested Mr. Levi Laub.
Q. Do you see him in court today?
A. Yes, there.

Mr. Metzger: Mr. Laub, stand up, please.
The Witness: Yes.

Q. Is that gentleman Mr. Levi Laub?
A. Yes.

The Court: Indicating Levi Laub.

Q. Tell the court everything you saw Mr. Laub do from the time you first saw him to the time you placed him under arrest?

A. The captain went over and spoke to the group and he was more or less representing the group and he spoke to the captain about breaking up the meeting. Then, after [fol. 110] he took the bullhorn and was yelling.

Q. You saw him with a megaphone?

A. Yes.

Q. I show you a picture here, this is People's Exhibit three in evidence, and ask you whether you recognize the individual in that picture.

A. Yes.

Q. Is that Levi Laub?

A. Yes.

Q. Is that the bullhorn you are talking about?

A. Yes.

Q. Did you hear him use this horn?

A. Yes, I did.

The Court: Showing the witness People's Exhibit three in evidence. Let the record show that—

Miss Condon, are you now taking the place of the other lawyer?

Miss Condon: That is correct.

The Court: Give your appearance.

Miss Condon: Gene Ann Condon, 401 Broadway, New York, New York, appearing for the defendant Laub on the Administrative Code violation.

The Court: How about the defendant Copeland?

Mr. Metzger: You appear for Copeland also?

[fol. 111] Miss Condon: Yes.

The Court: All right.

Mr. Metzger: After hearing the defendant Laub speak into the loud speaker—the megaphone—the bull horn—what happened next?

The Court: What was said?

By Mr. Metzger:

Q. Do you recall any of the words that you heard over this?

A. He was telling them not to break up the meeting. He said "Don't break up the meeting," and he was calling us "fascist cops" and I don't recall the exact words.

Q. What happened next?

A. Then the whole crowd started to run all over the place and they were running in the gutter and on the sidewalks.

Miss Dembitz: I object, your Honor. His testimony is vague and inaccurate and—

Mr. Metzger: Its inaccuracy is yet to be shown.

Miss Dembitz: It is too vague and diffuse to talk about people running here and there and this kind of vague generality—

Mr. Metzger: If it please the court, this was a pretty vague and loose situation that these officers were faced [fol. 112] with.

Miss Condon: I object to the characterization on behalf of the District Attorney.

The Court: The objection is sustained as to the observations made by the District Attorney. The observations made by Miss Dembitz, that objection is overruled with an exception.

By Mr. Metzger:

Q. Then what happened?

A. I worked my way up through the crowd and when I placed them under arrest, when I put them under arrest, he had an American flag in his hand.

Q. What did you say to him?

A. I asked him "Would you move off the sidewalk here".

Q. This was on the sidewalk?

A. Yes.

Q. Did you ask him or tell him not to use that megaphone —bull horn?

A. I didn't get a chance to tell him.

Q. What happened?

A. He didn't have it when I reached him.

Q. What happened then?

A. I asked him to move on and he said "no," and I said, "I am going to place you under arrest if you refuse to move [fol. 113] on". He said "no," I won't move on.

Q. I can't hear you.

A. I asked him to move on. I said, "If you don't move on, I will place you under arrest," and he refused to move and I placed him under arrest.

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[fol. 115] Ptl. Joseph Hines, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.

The Witness: Ptl. Joseph A. Hines, Shield number 20259, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Officer Hines, on the 8th of August last, about 3:30 to 4:30 P.M., were you on duty and assigned to the vicinity of Duffy Square in the County of New York?

A. Yes, sir.

Q. Did you arrest anyone at that time and place?

[fol. 116] A. Yes.

Q. Who was that?

A. Mr. Copeland.

Q. Vincent Copeland?

A. Yes.

Q. Do you see him in court today?

A. Yes, the third gentleman from the end aisle on the right-hand side.

Q. Stand up, Mr. Copeland. Is that the man?

A. Yes.

Q. Indicating the defendant Vincent Copeland. Will you tell the court what you observed Mr. Copeland do from the time you first saw him to the time you placed him under arrest?

A. He was gathering in Duffy Square Park, near the statue with other people in groups and using the speaker there.

Q. This?

A. Yes.

Q. Where did you get it?

A. I took it from the defendant at the time of the arrest.

Q. You took this speaker from him?

A. Yes.

Mr. Metzger: This is offered as People's Exhibit nine. [fol. 117] This is a 310a, transistor megaphone, eight watts, ITT Worldwide Product, and was made in Japan. That's what it says. That's the speaker?

The Witness: Yes.

Q. What did you see him doing with that speaker?

The Court: What is that known as?

The Witness: Normally we call it a bullhorn or a loudspeaker.

Q. It's technically a megaphone?

A. Yes.

Mr. Metzger: This is offered and ask that it be deemed marked as People's Exhibit nine.

Miss Condon: No objection.

The Court: Received as People's Exhibit nine.

Q. Did you hear Mr. Copeland speaking over this?

A. Yes.

Q. Do you recall any of the words that you heard him say?

A. Some of them were "Help us stop the war in Viet Nam".

Q. That's sufficient. You did hear words coming through the machine, is that right?

A. Yes.

Q. What else did you see Mr. Copeland do?

[fol. 118] The Court: Were they nice soft words, medium words, loud noises, what were they?

The Witness: The speaker amplifies the voice. It was a few megatones above the normal. It would be much louder than normal.

Miss Condon: I object. I move that the answer be stricken out.

Mr. Metzger: I don't think this is a proper objection for this attorney. It couldn't be going to the Administrative Code violation.

The Court: Objection overruled.

Q. You were telling us about what Copeland was doing?

A. He was gathering with the other people walking—

Q. How was he gathering the people?

A. With the microphone, by calling them over. He would mention some names on occasion. I don't remember what names he called. Other people would come to him and say things and walk away from him. He would move from one side to the other.

Miss Dembitz: Your Honor, I don't understand what time officer Hines is testifying about and precisely what point in the occurrences he is testifying about.

The Court: If it's not developed on direct, I will permit you to develop it on cross.

[fol. 119] Q. This observation you are talking about, is this made before or after Captain McAllister had some conversation with these people?

A. It was made after.

Q. You say he was going back and forth across Duffy Square to the south of the statue of Father Duffy, is that right?

A. Yes.

Q. You see this on People's Exhibit one?

A. Yes.

Q. Would you indicate where that is on People's Exhibit one?

A. That would be just north of the two flags and then he would drift south of the flag poles on both sides of the street.

Q. Across that grating?

A. Yes.

Q. Was he on the cement at all times?

A. Sometimes he would walk to the stairway—the steps going up to the statue.

Q. What happened after that, after he was going back and forth using the bullhorn?

A. I approached him and informed him that he would not be able to use the loudspeaker because it was a violation [fol. 120] unless he had a permit for it.

Q. Did he say whether or not he had a permit?

A. He didn't answer me at first. He was talking to the speaker. I told him again he would have to produce a permit.

Q. Did he ever produce a permit?

A. No, sir.

Q. Then what happened?

A. Then he got up on the steps and made a—made statements, "They are taking away our civil liberties," and things like that. I told him I would have to ask him to leave the area as he was ordered. Then I took him in a radio car and took him to the stationhouse.

Mr. Metzger: Your witness.

Cross examination.

By Miss Dembitz:

Q. Officer Hines, when did you arrive at Duffy Square?

A. Approximately ten minutes after four.

Q. From where did you approach Duffy Square?

A. I came from west 47th Street stationhouse. That would be west of Duffy Square.

Q. You walked down west 47th Street, going east?

A. Going east.

Q. To Duffy Square. You therefore were on the corner [fol. 121] of Broadway and 47th Street before you got to the Square itself, is that right?

A. I had to cross the street.

Q. When you were on the corner of 47th Street and Broadway—withdrawn.

When you were proceeding down 47th Street, east to the corner of Broadway and 47th Street, what did you hear, if anything?

A. We heard the people making loud voices. We could see the gathering of a crowd over there.

Q. I didn't ask you what you saw; what you heard?

A. People's voices.

Q. What kind of voices.

A. Chanting and singing.

Q. What were they chanting and singing?

A. Hymns or sayings and things like that.

Q. Can you state what hymn or saying?

The Court: Tell us what you heard.

The Witness: Just what I recall.

Q. Did you hear any speeches being given on this bullhorn?

A. I could hear the noise from the bullhorn—the voice on it.

Q. What else could you hear?

[fol. 122] A. I heard the people chanting and singing and saying "Stop the war in Viet Nam," and things to that effect.

Miss Dembitz: That's all.

Miss Condon: I have a question of the officer.

By Miss Condon:

Q. Did you observe the defendant with this instrument in his hand prior to the time that Officer McAllister had ordered that the meeting be broken up?

A. Prior to the time?

Q. That's right.

A. He had it in his hand at the time. I arrived at the scene, I don't know if it was prior.

Q. What time did you arrive at the scene?

A. Approximately 4:10 P.M.

Q. Could I see the device, please? Did you ever ask the defendant to show a permit for the use of this device to you?

A. I asked him if he had one.

Q. And did he answer you?

A. At first he didn't and then after that he said he didn't need one.

Q. You testified on direct examination that you told the defendant that he couldn't use this; that you had told the [fol. 123] defendant that he could not use this device for the amplification of sound because he did not have a permit.

A. That's right.

Q. How did you ascertain that he did not have a permit?

Mr. Metzger: There is no such testimony.

Miss Condon: As I recall, that was the officer's testimony. He said "You can't use that unless you have a permit".

Mr. Metzger: And the next question is, "How did you ascertain he had a permit".

Miss Condon: Are you stipulating that he had a permit?

Mr. Metzger: I am not stipulating anything of the kind.

The Court: The way to proceed is a question is asked and then you make an objection. Then give the Court a chance

to rule on it. It doesn't help the Court to have you argue when I have to decide whether or not it's admissible. The objection is overruled.

You told the defendant, did you not, that he couldn't use this thing on a public street without having a permit?

[fol. 124] The Witness: Yes.

The Court: What did he say?

The Witness: He didn't say anything at first.

The Court: Thereafter, what did he say?

The Witness: He didn't.

The Court: Did he ever produce a permit?

The Witness: No, sir.

Miss Condon: Did you ever ask to see a permit?

The Witness: I asked if he had one.

Miss Condon: Did you ever ask to see a permit?

The Witness: No.

Mr. Metzger: I think that's an answer and I object to the repetitive nature of the question.

Miss Condon: I asked it twice because the first answer wasn't responsive.

No further question.

Mr. Metzger: One thing.

Redirect examination.

By Mr. Metzger:

Q. Do you recognize anyone in this picture, People's Exhibit two in evidence?

A. Yes.

Q. Who do you see?

[fol. 125] A. The defendant I arrested.

Q. Vincent Copeland?

A. Yes, with the horn.

Q. Indicating the defendant Vincent Copeland.

The Court: One question I would like to ask. You were approaching Duffy Square. You heard loud noises over a bullhorn?

The Witness: Yes, sir.

The Court: About where were you when you first heard the voice over the bullhorn?

The Witness: I was at the southwest corner of 47th Street and Broadway, sir.

The Court: All right.

PTL. EDWARD J. FAHY, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Officer: Your name, shield, and assignment.

The Witness: Ptl. Edward J. Fahy, shield number 23172, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Ptl. Fahy, on the 8th day of August, in the afternoon, were you assigned to the area of Duffy Square in the County of New York?

[fol. 126] A. Yes, I was.

Q. Did you make any arrests at that time and place?

A. Yes, I did.

Q. Who did you arrest and on what charges?

A. I arrested Arthur Kunis for disorderly conduct and resisting arrest and also a Bruno Eckardt for disorderly conduct.

Q. Tell us about Mr. Eckardt, what you first observed him doing there on, after, and before you placed him under arrest. Before you do that, see if he is in the courtroom and if so point him out.

A. Yes, he is the gentleman sitting over there with the long hair and beard and the gentleman sitting next to him with the glasses and short hair.

Q. Which one is Kunis?

A. Kunis is on my left and Eckardt on my right.

The Court: Indicating the defendant Arthur Kunis and the defendant Bruno Eckardt.

Q. Do you recognize anyone in either of these two pictures?

A. Yes, I do. I recognize the defendant Arthur Kunis in this photo and Bruno Eckardt in this photo and in this photo also.

Miss Dembitz: We will stipulate that these two defen-
[fol. 127] dants were on Duffy Square.

Q. All right. Tell us about Eckardt. What did you see Eckardt do?

A. Eckardt or Kunis?

Q. Eckardt, what did you see him do?

A. Well, I observed Bruno Eckardt after I had placed—

Q. All right, take Kunis first. What did you see him do?

A. I saw Arthur Kunis standing in Duffy Square on the sidewalk, yelling and screaming, "facists, police brutality, gestapo". I went over to him and told him to stop and leave the area otherwise he will be placed under arrest. He made no answer to me. He ran out into the middle of Broadway and laid down. I went over to him and told him, "If you do not get up and move, you will be placed under arrest". He made no answer. He continued to lay there. Traffic was starting to get backed up. So, with the assistance of Ptl. Coffey, I grabbed him by the hands. Ptl. Coffey grabbed him by the feet and we carried him as he laid limp, dead weight, in our arms, into the radio car. As we got into the radio car, I then observed Bruno Eckardt.

Q. What was Bruno Eckardt doing?

[fol. 128] The Court: Did you place him under arrest at that time?

The Witness: Yes, I did.

The Court: All right.

The Witness: Bruno Eckardt was, as I turned around, I saw Bruno Eckardt lying in the middle of Broadway. I turned around and went back to him while the other prisoner was in his custody.

Q. Eckardt was lying in Broadway too?
A. Yes.
Q. That's the first time you saw him?
A. Right.
Q. What did you do?
A. I went over to him and told him to get up, otherwise I will place him under arrest. He threw his arms up to me and said, "Here I am".
Q. Was he on his back in the street, sort of looking up at you?
A. He was on his back looking up at me.
Q. He held his hands up to you?
A. Yes.
Q. What did you say?
A. I assisted him to his feet and placed him under arrest.

[fol. 129] The Court: You say both Kunis and Eckardt were out in the street where ordinarily the motor vehicles used to go up Broadway?
The Witness: Used to go down Broadway.
The Court: This was in the lane of automobile traffic?
The Witness: Correct.

Q. I show you People's Exhibit one, being a picture of Duffy Square, and ask you to point out where each defendant was lying on the pavement of this thorofare.
A. Kunis was lying parallel with the flag pole right here with the second lane of traffic and we carried him from here to the radio car, which was diagonally away from the lamp post. We placed him in the car and I turned around and saw Eckardt, who was lying a little further up in this vicinity, also in the second lane of traffic.

The Court: How many lanes of traffic are there for motor vehicles at that point?
The Witness: This lane was available being they refused to let the taxis park on that particular day. That would be, I believe, five or six lanes, your Honor. I couldn't say for sure.

Miss Johnson: What lane did he—

The Court: He was referring to People's Exhibit one. [fol. 130] That's the picture in evidence of the Duffy Square area.

Miss Johnson: I believe he testified he put the defendant in a particular lane after having run across the street.

The Court: His testimony is that Kunis was stretched out in the street—in or about the second lane and later on, when he picked him up with the assistance of his brother officer, he placed Kunis in a radio motor patrol car, is that correct?

The Witness: That's correct.

The Court: After this he saw Eckardt in the street in approximately the same place or close to the place where he saw Kunis.

Miss Johnson: Thank you.

Mr. Metzger: You may inquire, counselor.

Cross examination.

By Miss Dembitz:

Q. Officer Fahy, when did you arrive at Duffy Square?

A. I arrived there—we left the station house—approximately ten minutes after four or a quarter after four.

Q. When you arrived at Duffy Square—there has been testimony here that Captain McAllister had given an order that the assembly disperse. Had that order been given [fol. 131] before you arrived at Duffy Square?

Mr. Metzger: I have to object to the form of the question.

The Court: How could he possibly know that.

Q. At the time you arrived at Duffy Square, was this —were policemen attempting to disperse the crowd or telling them to move on? Was anyone telling the crowd to move on at the time you arrived at Duffy Square?

Mr. Metzger: I assume within the officer's purview of sight or sound.

Miss Dembitz: I think that's implied in any question.

Mr. Metzger: No it isn't. It's my objection.

The Court: The objection is sustained.

Q. Did you hear any order given by any fellow officer that the assembly—the people assembled on Duffy Square move on or disperse?

A. Not directly, no. The crowd was being dispersed by us automatically as we arrived there. After a certain period of time we started to disperse the crowd. I cannot recall—

Q. Were you told to disperse the crowd?

Mr. Metzger: Objection.

The Court: Object overruled.

[fol. 132] The Witness: Not by any particular individual, no.

Q. Were you under no order to disperse the crowd?

A. I was ordered, as far as my duty, yes.

Q. Who told you your duty was to disperse the crowd?

A. No one.

Mr. Metzger: Same objection.

The Witness: No one.

Mr. Metzger: Wait until an objection is made and ruled upon by the Court before continuing your answer.

The objection is as to the line of questioning as to whether he was under an order to disperse the crowd and who gave him the order and so forth and so on.

Miss Dembitz: This witness is testifying as to the arrest he made and the occurrences leading up to the arrest. Certainly one of those occurrences an order was given as to moving on and if he gave it and why he gave it.

The Court: I sustained the objection generally before as to what orders he received before he left the station-house.

Miss Dembitz: This is different.

The Court: If you are talking about what orders he was given when he arrived at Duffy Square, I will permit it. You are a patrolman, are you not?

[fol. 133] The Witness: Yes.

The Court: And you are subject, I assume, to commands of superior officers?

The Witness: Yes.

The Court: When you got to Duffy Square, were you given, yes or no, an order by any superior officer?

The Witness: Yes, sir.

The Court: And you followed that order?

The Witness: Yes, sir.

Miss Dembitz: What order were you given by your superior officer at Duffy Square?

The Witness: We were given an order to disperse the crowd.

By Miss Dembitz:

Q. You testified that when one of the defendants—that one of the defendants was lying in the street?

A. That is correct.

Q. And you testified as a result of that, the defendant lying in the street, traffic backed up, is that correct?

A. That is correct.

Q. Had traffic backed up before that time?

A. Not to my knowledge it hadn't.

Miss Dembitz: That's all.

Mr. Metzger: One question on the subject of your orders.

[fol. 134] Did you ever hear this read to you at the scene at Duffy Square by a commanding or superior officer, something to the effect that "attitudes of the Members of the Force of this Department at the scene of mass demonstrations should be one of strict neutrality. Members of the Force should remember they are responsible for law and order and safe-guarding the rights of all citizens at the scene of any demonstration. They should be alert to

prevent any violation of law and take action in the event the law has been violated".

Did you ever hear anything like that read?

The Witness: Yes, I have.

Miss Dembitz: I think it's irrelevant.

The Court: I think so too. If you make an objection, I will sustain it.

Miss Dembitz: Irrelevant.

The Court: It's in. You are not moving to strike it out?

Mr. Metzger: May I say that the door is open to such orders given at the time. I have a whole bag full.

The Court: Let's stop playing tiddlywinks.

Mr. Metzger: No further questions.

[fol. 135] By Miss Johnson:

Q. Is it your testimony that when you first saw the defendant Kunis that he was on the sidewalk of Duffy Square Island?

A. That is correct.

Q. And it was at that time that you told him to move on?

Mr. Metzger: Prior to the time that you went into the street?

A. I told him to move on, right.

Q. Now, was it also your testimony that Kunis was advised that he was under arrest when he was placed in the car or what point was Kunis advised that he was under arrest?

A. I advised him that he would be placed under arrest if he refused to leave the sidewalk area after shouting and screaming, when he ran into the street. I again advised him if he didn't get up off the street he would be placed under arrest. He refused to get up and I placed him under arrest at that time.

Q. Did you advise the defendant he was being placed under arrest?

A. Yes.

Mr. Metzger: Just a minute, Officer. May I make an objection. I see what's happening here. There is a charge [fol. 136] of resisting an arrest. This defendant asked for a—

Miss Condon: I object to the District Attorney putting on the record—

Mr. Metzger: This has been testified to and I don't think there is a question about it.

The Court: You are in a court of law. I have repeatedly admonished both sides not to argue these things. If the Court feels it needs argument, he will ask for it. The way to proceed is to ask questions, and make an objection without any lengthy argument. I don't need the argument. If I want argument, I will ask for it. That applies to both sides.

Mr. Metzger: The objection, then, is that what the defendant was advised with respect to being arrested, is not material to the charge of disorderly conduct.

The Court: The objection is overruled.

Miss Johnson: Would you testify at what point you told the defendant Kunis he was under arrest?

The Court: He already told us that. He already testified. That is repetitious. He said when the defendant was stretched out in the street he told him if he didn't get up he was going to place him under arrest. The defendant failed to get up and he said he placed him under arrest [fol. 137] and took him to the police car, is that correct?

The Witness: That's correct.

Miss Johnson: That wasn't my question. Perhaps it's a matter of semantics. To tell somebody you will arrest them if they do something or don't do something isn't advising them that you are now under arrest for failure to have done something.

The Court: I have heard the testimony.

Miss Johnson: Would your Honor permit the officer to answer the question?

The Court: He has already answered it.

Miss Johnson: My recollection of his earlier testimony is he didn't advise him he was under arrest until he was in the automobile.

The Court: Before. He said that when he was on the street, yelling and saying certain things, he said to him that he had better stop that or he is going to place him under arrest. The defendant, instead of stopping, ran into the street and threw himself down on the public highway and then he told him to get up and told him if he didn't get up he is going to place him under arrest. The defendant failed to get up and then he arrested him, is that correct?

[fol. 138] The Witness: That is correct.

Miss Johnson: You say that you observed the defendant Eckardt as you were placing the defendant Kunis into the police car. Had you observed him prior to that time?

The Witness: No.

Miss Johnson: That was the first time you observed the defendant Eckardt?

The Witness: That is correct.

* * * * * * *

[fol. 140] Direct examination.

By Mr. Metzger:

Q. Officer Knoll, on the 8th of August last, were you in the vicinity, late in the afternoon, of Duffy Square in the County of New York?

A. Yes, sir.

Q. I show you People's Exhibit two in evidence. That's this picture and People's Exhibit seven, this picture, and ask you whether in either one of those pictures whether or not you recognize anybody?

A. Yes.

Q. Who do you recognize in People's Exhibit two?

A. I recognize all the parties here, one, two, three, four. I arrested party one.

Q. Who is that?

A. Jeremiah Gelles.

Q. Do you see him in court today?

A. Yes, the man standing up.

[fol. 141] Mr. Metzger: Indicating the defendant Gelles.

Q. People's Exhibit seven, who do you recognize?

A. Party number two.

Q. Who is that?

A. Ann Kyllingstad, sitting in the green dress.

Q. Did she have this black ring around her arm when you arrested her—the black band?

A. Yes. She did. I believe she removed it in the station-house.

Q. Will you tell the court which defendant you arrested first?

A. Jeremiah Gelles.

Q. And tell the court what you observed the defendant Gelles do at the time you first observed him through, to, and including the time that you placed him under arrest?

A. When I first observed him, he was standing on the east side of the fence at Duffy Square on the sidewalk portion.

Q. On the sidewalk itself?

A. Yes, sir, standing, I believe, with two other individuals. He was speaking—as I walked up to him I said, "You fellows can't stand here. You are blocking traffic, blocking the roadway and blocking the pathway.

Q. On People's Exhibit one, point out where he was [fol. 142] when you were addressing him.

A. Right over here about the shadow mark.

Q. Indicating the sidewalk on the easterly side of the street by the bus in the picture.

Miss Dembitz: Would you repeat that, please?

Mr. Metzger: He pointed to this shadow here.

Miss Dembitz: Which would be to the south and the east of the statue on Duffy Square.

The Witness: Almost east off the corner. Almost due east off the corner.

Mr. Metzger: That's on the sidewalk.

The Court: What was he doing and saying, if anything?

The Witness: He was standing there and as I walked up to him and asked him to move along, he said, "Oh, you facist cops. You think you can get everything and do anything you want". I said, "Please move along. You are not accomplishing anything by standing here". Again he ranted, "You can't tell me what to do. I have my rights". I said, "Mister, I am going to arrest you if you don't move on," and he said, "Go ahead and arrest me."

By Mr. Metzger:

Q. You had told him that he was blocking the passage?

A. Yes. I informed him initially, when I first started [fol. 143] to talk to him.

The Court: What tone of voice was he using?

The Witness: Rather venomously, sir. He was very emphatic about it.

The Court: Softly or medium?

The Witness: It was loud.

The Court: Loud.

Q. All right, what happened then?

A. I informed him I placed him under arrest and walked him across in front of the Square, which would be south of the Square, and placed him in a cab. Yes, I put him in a cab.

Q. With respect to the defendant Kyllingstad, the female, it was the female, wasn't it?

A. Yes, sir.

Q. What did you see her do at the time you first observed her?

A. When I placed Mr. Gelles in the cab, there were—of course there was quite a to-do going on in the immediate

area and I left the cab. I stood back from the cab and saw Miss Kyllingstad—she would be on the west side, almost in the same position as Mr. Gelles was except on the opposite side of the Square—on the Broadway side of the Square—she was in a very loud conversation on the sidewalk there with a sergeant. She was—I am trying to [fol. 144] think whether she was standing. Well, she was on this very loud conversation with him. She was speaking. I didn't hear what she had to say.

Q. Who was she talking to?

A. The sergeant in charge of the detail. Immediately thereafter, during the course of this, she—I believe she slapped him, sir. That's what I could say it was.

Miss Dembitz: We object to the officer's testimony—what he believes.

The Witness: She slapped him, Ma'am.

Miss Johnson: I object, your Honor. The defendant isn't charged with anything like that. It has nothing to do with the complaint before the court.

The Court: Objection overruled. It's part of the res gestae.

Q. Then what happened?

A. Then I immediately placed her under arrest and informed her she was under arrest.

Q. This is at the point you saw her slap the sergeant?

A. Yes, sir. The sergeant was in—we had one sergeant there at the time.

Q. I am going to show you People's Exhibit seven. I ask you whether this is a fair and accurate representation of the time you just testified to, the time you placed her [fol. 145] under arrest?

A. Yes, sir, it is. This would be—you see, the way she is facing. I was standing behind her, off to the side, and it's obvious you could see what she was doing.

Mr. Metzger: Your witness.

Cross examination.

By Miss Johnson:

Q. Officer, you observed the defendant Gelles and he was standing with two other people?

A. Yes, Ma'am.

Q. Any of those other people—

A. I can tell you one of them. One of them is the gentleman on the far left over here. I don't know his name.

Mr. Metzger: Stand up over there.

The Court: That the man you mean?

The Witness: Yes, sir.

Q. You didn't arrest the defendant Turner, is that correct?

A. No, Ma'am.

The Court: Let the record show that the gentleman standing up is the gentleman William Turner.

Q. Is this where the Defendant Gelles was when you first observed him? Had you observed him at all prior to when you saw him with two other people?

[fol. 146] A. When I first observed him, he was walking towards the—he would be off the south corner of Duffy Square walking towards—sort of moving over and taking another position at the sidewalk on the side. As I was walking over toward him, that's where they were going.

Q. Who do you mean by "they"?

A. This gentleman here, Mr. Turner, Mr. Gelles, and the other party I wouldn't recognize.

Q. They were walking from—

A. They were stepping down from the steps. I believe they were stepping on the steps and they stepped down.

Q. They were standing on the level ground?

A. When I got to him, he was in the sidewalk.

Q. How far were they from the actual curb at that time?

A. Oh, I would say maybe four feet. Possibly four feet.

Q. Were there any other people in this crowd of three or was this just a crowd of three?

A. There were people all over the Square.

Q. But you say that there was this group of three people?

A. These three were more or less—

Q. Would you say they were by themselves?

A. No, they weren't by themselves, but they were closer together than the others. These seemed to be standing [fol. 147] there and giving out with more conversation and more loud talk than the others who were in the immediate vicinity. I mean these three were closer together than the others, Ma'am. They were within six inches of one another where there were five and six feet between them.

Q. You say they were four feet from the curb. That would be the curb of Seventh Avenue?

A. Yes.

Q. Were there any people standing between them and the curb?

A. Yes, there were. There were people standing between them and the curb, yes.

Q. Did you ask people—those other people to move?

A. No, Ma'am because I felt that these three that were standing there were the ones that I desired to get moving and I think the others would have moved along right as they did.

Q. Not what you think, Officer.

Mr. Metzger: Objection. I would like—the objection seems to have been made to the witness and if there is an objection—

Miss Johnson: I object to the officer testifying as to what he thinks.

The Court: That's sustained.

[fol. 148] Miss Johnson: So that the people that were standing—

The Court: Were these other people who were between the defendants, these three people that you say were using

loud language, were the other people that you didn't order to move on, using loud language?

The Witness: No, sir, they were off to the right. They were more or less walking.

Miss Johnson: Walking past the area?

The Witness: They were meandering. Walking is the wrong word.

Miss Johnson: I have no further questions.

* * * * * * *

[fol. 160] PTL. DONALD WALSH, Shield Number 8224, assigned to the 16th Precinct, was called as a witness on behalf of the People, and after having first been duly sworn by the Court, testified as follows:

Bridge Officer: Name, Shield, and assignment.

The Witness: Patrolman Donald Walsh, 8224, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Officer, Walsh, on the 8th day of August, 1964, in the afternoon, did you have occasion to be in the vicinity of Duffy Square in the County of New York?

A. I did, sir.

Q. Were you on duty?

A. Yes, sir.

Q. Were you in uniform?

A. Yes, sir.

[fol. 161] Q. Did you make any arrests at that time?

A. I did.

Q. What are the names of the people that you arrested?

A. Robert Apter, Key Martin, and Jeremiah Teahan.

Q. All right. Now, whom did you arrest first?

A. Robert Apter.

Q. Do you see him in court today?
A. Yes, on the end there.

Mr. Metzger: Indicating the defendant Apter.

Q. Will you tell the Court, please, what happened, what you saw and observed from the moment that you first had Mr. Apter under your observation, everything that you saw him do until the time you arrested him.

A. Yes, I first noticed Mr. Apter running from the sidewalk to the street and back, back and forth, speaking to the crowds, telling them not to obey our orders to get back on the sidewalk and to make openings for pedestrians. I spoke to him on this.

Q. Do you remember what you said to him, specifically? [fol. 162] A. Yes, I said, "Stop telling them this and behave yourself."

Q. Speak up.

A. I said, "Stop telling them this and behave yourself," and he ran away from me and proceeded to tell them:

"Don't listen to the police."
"Don't let them interfere with us."
"Stay where you are."

Q. Then what happened?
A. Then I placed him under arrest.
Q. Where was he at that time?
A. About that time he was in front of the statue of Father Duffy.

Q. All right, now, I am going to show you the People's Exhibit Number "1", a picture of Duffy's Square in this county, and ask you to describe or show or point out the area where the defendant was running around.

A. He was going from this point over to here. (Indicating.) They were all out in the sidewalk, here, and he would be running in and out, back and forth.

Mr. Metzger: Indicating the middle south end of the [fol. 163] fenced in area, around the statue, and over to where the bus is in the picture; is that correct?

A. That is right.

Mr. Metzger: Will the defense stipulate that Apter was at the scene at this time?

Miss Dembitz: Yes.

Miss Johnson: Yes.

The Court: What was the tone of his voice when he said the things you said?

The Witness: He was yelling and screaming, Your Honor, and when I spoke to him about it, he screamed at me, you know, "Police intervention," and "Let us alone."

Mr. Metzger: I can't hear you.

The Witness: When I spoke to him about it, he was yelling, "Police intervention," and ran back to the street again; and I had to grab him again. When I placed him under arrest he started to scream, and he placed himself on the ground, and that is when the other defendants came and tried to take him away from me. He threw himself on the ground on the right side of the statue when we tried to get him in the cab, and then Teahan and Key came in [fol. 164] and tried to intervene and take him away from me.

Q. All right, now, will you describe, please, just exactly what happened when Apter threw himself on the ground, with respect to the defendants Teahan and Martin?

A. While Apter was on the ground screaming, "brutality," and "fascist police," Key Martin and Robert Apter (sic) came over.

Q. Do you see Key Martin in court?

A. Yes.

Mr. Metzger: Will you stand up, please.

Q. Is that Key Martin?

A. Yes.

Mr. Metzger: Indicating the defendant Key Martin.

Q. Do you see Teahan?

A. He is sitting next to him.

Mr. Metzger: Indicating the defendant Teahan.

Q. What did they do?

A. They started yelling to us, "Police brutality. Police gestapo," and they kept pulling on defendant Apter.

Q. While he was on the ground?

[fol. 165] A. At this time we were trying to get him in the cab, and they were pulling the other way. So at this time I told them to get away or they would be under arrest, and they kept pulling, tugging and pulling and then I placed them under arrest.

Q. In what tone of voice were they talking at the time?

A. Almost hysterically. When I placed them in the cab, under arrest, as we started, defendant Teahan opened the window and screamed to the crowd to help him, assist him; and he tried to open the door and get out, and I had to pull him by the neck and put him back in.

Q. What time did you arrive on the scene, officer?

A. We turned on at 4 o'clock, and we got there five minutes after.

Q. Five minutes after 4?

A. Yes, sir.

Q. What did you see in the vicinity, or on Duffy Square?

A. I saw a crowd of 250 or 300 people on the streets, the park, and out on the gutters, back and forth with placards. There was speaking going on at the time with a loudspeaker; and it was the scene of traffic, where traffic [fol. 166] was being slowed; pedestrians couldn't get through the street to the bus stop because of the amount of people there.

Q. Now, did you see some ranking police officials go up to the group of the speakers?

A. Yes, I did.

Q. Now, were these people on the street and walk, as you described, prior to this?

A. They were there. As we came they were there already, before us.

Q. And what happened after the officials went up to the —the police officials went up to the group that was speaking over the loudspeaker?

A. Captain McCallister was attempting to speak to the speaker, but the speaker would not let him get any word in.

Q. Was it after this that you made your arrest?

A. When the captain saw he couldn't get them to do it, he ordered us to get them back on the sidewalk. He didn't tell us to make an arrest. He made us get them on the sidewalk. Then it became apparent they were not going to obey us, and that is when the arrest was made.

[fol. 167] By Miss Dembitz:

* * * * * * *

[fol. 175] Cross examination.

By Miss Dembitz:

Officer, about how many people would you say were at Duffy Square when you got there, in front of the Duffy Statue?

The Witness: In my opinion it was about 250 or 300.

Miss Dembitz: Well, Your Honor, that does not—if I may say so, respectfully, I think that cross-examination permits the attorney for the defendant to refer to previous testimony, and to question the witness on the basis of whether he agrees with the previous testimony or whether he considers the previous testimony erroneous.

The Court: Your observation is in my opinion without merit; and, therefore, your motion, if it is a motion, is overruled, with an exception to your defendants.

Q. Officer Walsh, are you attached to the precinct in this area that is stationed on West 47th Street?

[fol. 176] A. Yes, I am.

Q. When you proceeded to Duffy Square—I withdraw that. When you arrived at Duffy Square, were you given

an order by your superior there to disperse the crowd on the Square?

A. No, ma'am.

Q. What order were you given by your superiors?

A. (No response.)

Mr. Metzger: Speak up, officer. I can't hear you.

A. The captain, at the time, after we were there a few moments and he attempted to speak to the speaker and saw we wouldn't be able to get the crowd back on our own, gave us orders to move the crowd back on the sidewalk.

Q. So that your testimony is that your order was to move—to keep the people on Duffy Square?

A. To try to get them on the sidewalk and make an opening for pedestrian traffic.

Q. Is it your testimony that your order was for people to remain on the Square?

A. He did not say anything about remaining. He told us to get them on the sidewalk.

[fol. 177] Q. And you were not under an order for them to leave the Square?

A. No, ma'am.

Q. You made a statement that you observed that traffic was stalled. Where did you observe traffic to be stalled?

A. At times it would be on the lane next to us, on the Seventh Avenue side, depending on how the crowd was rolling.

Q. What was the reason the traffic was stalled? Was the reason—

The Court: Let him finish the answer. You asked what was the reason the traffic was stalled.

Finish your answer.

And will you please step back a little. You see, he is talking to you, and he is inclined to have a low voice anyway; and I would like to hear him, and the defendants should hear him.

Go right ahead.

A. The cause of the traffic being blocked up was that at intervals the crowd would keep running back and forth [fol. 178] into the street with placards; and, naturally, the traffic would put their brakes on, and on the next lane there would be the curiosity of what was the crowd doing, what was going on, and so on.

So, we attempted to get them back on the sidewalk, to put the traffic through.

Q. Was there an officer directing traffic?

A. On the corner, yes.

Q. Which corner?

A. I first saw him on the Broadway side, but I believe because of what was happening on the Seventh Avenue side he moved over to Seventh Avenue.

Q. Was there a line of taxis that were driven—that were commandeered to take people to the station house?

A. I know of at least two. I know my prisoner I put in a cab.

Q. Was there patrol cars to take people to the station house?

A. I had observed one patrol car. There may have been more.

Q. So, in your observation, there were at least two taxis and one patrol car that was lined up?

[fol. 179] A. On the Broadway side.

Q. On the Broadway side? Officer Walsh, I would like to turn your attention to a different subject.

Miss Dembitz: On this I am willing to make Officer Walsh my witness, if this does not relate to the matters brought out on direct examination.

Q. On this picture, which is—

The Court: Defendant's Exhibit A.

Mr. Metzger: Indicating People's Exhibit 1.

The Court: People's Exhibit 1.

Q. Which is People's Exhibit 1.

Miss Dembitz: I do have to go over to him at this time.

The Court: You may go right up there.

Q. How long have you been stationed at this precinct?

A. Almost 12 years.

Q. So you are familiar with this area?

[fol. 180] A. Yes, ma'am.

Q. This is a picture which has been identified as being Duffy Square.

A. Yes, ma'am.

Q. However, there are several—I want to ask you about several features of Duffy Square which are not entirely clear on the picture. Is there any area of Duffy Square to the south of what is shown on this picture?

A. It proceeds a little further out than you have there. It ovals.

Mr. Metzger: Speak up.

Q. And what is to the south of the park, Duffy Square, south of what is shown on this picture?

A. (No response.)

Q. Is there some structure to the south of what is shown on this picture?

A. I can't recall, ma'am. I don't recall.

Q. You don't recall? You don't recall that there is any structure to the south of what is shown on this picture?

A. On the Square itself?

Q. On the Square. You said you are familiar with this area.

[fol. 181] A. I walked that street thousands of times.

Mr. Metzger: Counsel is attempting to impeach her own witness.

Miss Dembitz: I think he is a hostile witness.

Mr. Metzger: I don't think he is hostile.

Miss Dembitz: Well, he is unresponsive.

Mr. Metzger: Your Honor, may I respectfully say that the officer said he does not remember. If counsel is going to argue with her own witness—

Miss Dembitz: All right, I will proceed.

Q. Now, officer Walsh, to the north of Duffy Square is 47th Street; is that correct?

A. Yes, ma'am.

Q. And to the south of Duffy Square, abutting on Duffy Square, is 46th Street; is that correct?

A. That is correct.

Q. Where is there a crosswalk for pedestrians?

A. On 46th Street or 47th. Both have crosswalks.

[fol. 182] Q. Where are those crosswalks situated?

A. Directly across. You mean across where it is going east and west?

Q. Are those crosswalks at the extremity of Duffy Square, on the north and south?

A. On both of them. You can walk on the park on the south side of Duffy Square, at 47th Street. You walk across the street, the park itself; and on the 46th street side you can walk along the tip of Duffy Square awaiting for the light.

You see, you have a light on this side, and you have a light over there. If traffic was to start you have to stay on the tip of Duffy Square.

Q. But the crosswalks are at the extremities of Duffy Square?

The Court: You mean the north?

Miss Dembitz: The northern.

The Court: And the southern?

Miss Dembitz: And the southern.

Q. Off the northern and the southern end.

The Court: I am very familiar with it. I am very familiar with it. So, if this is for my benefit, I can tell you that [fol. 183] I am very familiar with that particular section.

Miss Dembitz: Well, Your Honor, I would like this to be on the record.

The Court: Yes, yes.

Q. Now, Officer Walsh, if a pedestrian came unto Duffy Square at the northern end—do you follow me—

A. Yes, ma'am.

Q. —how far south could be proceed on Duffy Square?

A. South?

The Court: I don't understand that question.

Miss Dembitz: The question is: How far south could a pedestrian proceed on Duffy Square.

The Court: You mean in the area where the monument is?

Q. I mean, could he proceed any further than 46th Street on Duffy Square?

The Court: No.

A. No.

Q. Would he then have to leave Duffy Square in order to [fol. 184] get to east or west?

A. He would have to cross the street.

Q. He would have to cross the street?

A. Yes.

Miss Dembitz: Your Honor, I think the relevancy of this will be apparent in our argument on this case.

The Court: All right.

Q. Now, Officer Walsh, you have been aattached to this precinct for 12 years?

A. Almost, yes, ma'am.

Q. Are you frequently, then, in the area of Duffy Square?

A. Yes, ma'am.

Q. Have you observed bond rallies on Duffy Square?

A. Bond rallies?

Q. Rallies to sell bonds, on Duffy Square?

The Court: Do you have an objection? Is there an objection?

Mr. Metzger: That is leading and not material, as well.

Miss Dembitz: Well, this is cross-examination.

Mr. Metzger: He is your witness, as I understood it.

[fol. 185] Miss Dembitz: That was with respect to this exhibit. (indicating)

The Court: Do you object?

Mr. Metzger: I object.

The Court: Then get on our feet and object if you have an objection.

The objection is sustained.

Miss Dembitz: I am willing to continue to regard this witness as my witness for the purpose of questioning him with regard to activities on Duffy Square.

The Court: I am permitting you to do it, and if the questions are proper I will permit it; if they are improper and there is a timely objection, I will rule on it.

Miss Dembitz: Yes, sir.

Q. In the 12 years that you have been at this precinct, have you observed any demonstrations or rallies on Duffy Square?

Mr. Metzger: That is objected to, Your Honor. Immaterial.

The Court: The objection is sustained.

[fol. 186] Miss Dembitz: Your Honor, on this then we would have to make an offer of proof, because we consider it very material to the constitutional issues on this case.

The Court: That is up to you.

Miss Dembitz: May I ask, are you sustaining the objection on the grounds of its materiality?

The Court: I sustained the objection. Period. And I am giving you an exception. I don't have to explain my reason.

Miss Dembitz: I would like to know if it is an objection as to form, in which case I would rephrase the question.

The Court: It was not sustained as a question of form. I did not hear any objection as to a question of form.

Miss Dembitz: Just a moment, please.

The Court: Yes, take your time. Do you want a recess?

Miss Dembitz: No, sir. I just need a minute and a half.

* * * * * * *

[fol. 188] PATROLMAN ROBERT ANNITTO, was called as a witness on behalf of the People, and after having first been duly sworn by the Court, testified as follows:

The Court: What is your name?

The Witness: Patrolman Robert Annitto.

The Court: I have to hear it.

The Witness: Annitto.

Mr. Metzger: Officer, I want you to speak so the person sitting in the far rear of this court can hear you clearly and distinctly.

The Witness: Shield 6377, 16th Precinct.

Direct examination.

By Mr. Metzger:

Q. Stop whispering, will you? Officer, Annitto, were you on duty on the 8th day of August last?

A. Yes.

[fol. 189] Q. About 3:30 to 4:30 p.m., did you have occasion to be in the vicinity of Duffy Square in the County of New York?

A. Yes.

Q. Were you in uniform?

A. Yes.

Q. Did you make any arrest at that time?

A. Yes.

Q. Whom did you arrest?

A. Albert Maher and William Turner.

Q. Do you see either one of those defendants in the courtroom today?

A. William Turner is in the first row.

Q. Is that the man standing up?

A. Yes.

Mr. Metzger: Indicating the defendant Turner.

Q. Do you see Albert Maher in court?

A. No, sir.

Q. Will defense counsel stipulate that defendants Maher and Turner were at Duffy Square at the time in question?

Miss Dembitz: Yes.

[fol. 190] Q. Whom did you arrest first, Officer Annitto?

A. Albert Maher.

Q. Will you tell the Court, please, exactly what you saw from the time you first saw Albert Maher to and including the time you placed him under arrest. Speak in a nice, loud, and clear voice.

A. I saw Albert Maher running around in the Square there, waving a placard. He struck a police horse with the placard. I went over and placed him under arrest and put him in a car.

Q. Did you hear him say anything?

A. He hollered, "facist police."

Q. In what tone of voice, soft, medium, or loud?

A. No, it was loud.

Q. And what about the defendant—withdrawn. Now, will you go into the circumstances of the striking of the horse a little bit more. What exactly did you see him do?

A. I saw him strike it with the placard, and he just kept running around, trying to move it.

Q. Move what?

A. Move the horse.

Q. Well, what happened to the horse when he received [fol. 191] this striking?

A. The mounted man kept the horse under control.

Q. I see. Did he do anything else, Defendant Maher?

A. No.

Q. All right. What about the defendant Turner?

A. Turner was acting loud.

Q. Wait a minute, officer.

Mr. Metzger: I am going to renew the motion that witnesses be excluded. I notice that some people have entered this courtroom after the motion was made and who have not testified; and they are not defendants.

The Court: If there is any person in this courtroom, either witnesses that are here on behalf of the prosecution or witnesses for the defendant, outside of the defendants themselves, of course, all witnesses on both sides in this case on trial are excluded from the courtroom.

Q. You were telling us then, Officer Annitto, about the defendant Turner.

A. Turner was screaming and hollering and trying to [fol. 192] keep two policemen from keeping the prisoner they were trying to bring to the car.

Q. Do you remember which prisoner?

A. It was one of the girls, but I don't remember who.

Q. What was he doing, specifically?

A. He was standing in front of them, trying to keep them from bringing the girl to the car.

Q. Can you look at People's Exhibit 1 and point out where this was taking place?

A. Over here.

Mr. Metzger: Indicating the area between the flagpole and the lightpost on the western side of Duffy Square.

Miss Johnson: Can you point it out?

Mr. Metzger: Indicating this here.

Q. That is on the sidewalk. Is that on the sidewalk?

A. Yes, on the sidewalk.

Q. Was he speaking? William Turner, was he saying anything?

A. He was hollering, "Leave them alone," and "facist [fol. 193] police."

Mr. Metzger: All right, Your witness.

Cross examination.

By Miss Johnson:

Q. Officer, you say that the defendant Maher was trying to move the horse?

A. Yes.

Q. With the placard?

A. No, he was not trying to move it with the placard.

Q. How was he trying to move the horse? Can you explain that?

A. He was probably doing his best to try and—to upset—

Q. As you observed, I am not asking you what you thought he was doing. I am asking you what you observed him doing. How was he trying to move the horse?

A. Well, he was trying to get the horse upset, I guess.

The Court: Well, what was he doing.

Miss Johnson: Objection.

[fol. 194] The Witness: He struck the horse with the placard.

The Court: That is what she is asking you.

Miss Johnson: I ask to strike the answer to the last question; that he apparently was trying to upset the horse. I would like that stricken from the record.

Q. My question, officer, was, how was he trying to move the horse?

A. He was trying to upset the horse.

Miss Johnson: Objection, Your Honor. I move to strike it. It is not responsive.

Mr. Metzger: Your Honor, the question is not proper.

The Court: The motion is granted, and the answer is stricken from the record.

Did this horse have a headache, or was he trying to cure an upset stomach?

The Witness: No.

The Court: Then, use the proper language instead of this fancy language, "He was trying to upset the horse." [fol. 195] What do you mean by that? What do you mean by that?

Mr. Metzger: Your Honor, may I respectfully say that perhaps the answer, in the first place, to my question, was not proper; but there was no objection when he said he was trying to move the horse.

He did testify as to what he saw happen. If the question is continually put to him as to how he was trying to do it, I think he was trying to say what mental process was going through the defendant's mind, or what he—I don't think he should answer that question.

The Court: Well, we are not interested in the operation of his mind. We are interested in what he saw.

Mr. Metzger: And he testified already that he saw him strike the horse with the placard. There is nothing else that came out that they can ascertain.

The Court: I heard the testimony. Go ahead.

Q. Well, officer, was—what was the horse doing at the time the defendant Maher was trying to move it?

[fol. 196] A. The rider had the horse, and he was trying to move the demonstrators from the Square.

Q. The rider?

A. The rider, the mounted policeman.

Q. Was trying to use the horse to move the demonstrators?

A. Yes.

* * * * * * * *

[fol. 200] The Court: You may proceed.

Q. Officer, on the day in question, did you see the defendant Maher attempting to push a horse away from someone who was lying on the ground?

[fol. 201] A. No.

Q. Well, I would like to show you the photograph, again, officer, which you said you observed. Do you recognize the defendant Maher, and did you observe this particular scene on the day in question? Did you see this scene on the day in question?

A. Yes.

Q. Then, I ask you again whether you observed the defendant Maher attempting to push a horse, the horse which appears on it.

A. I said, "No."

Miss Dembitz: I would like to clear up one or two points, and we will make the witness the defendants' witness for the purpose.

Direct examination.

By Miss Dembitz:

Q. Officer Annitto, how long have you been attached to this precinct?

A. A year.

Q. In other words, you are—your time at this precinct began in October of 1963?

A. Right.

[fol. 202] Q. Is that correct?

A. Right.

Q. Officer Annitto, have you been in the area of Times Square and Duffy Square—were you in the area of Times Square and Duffy Square in the month of May, 1963?

A. (no response)

Q. In connection with your duties?

A. Yes.

Q. Officer Annitto, did you during the month of May observe a demonstration in Duffy Square?

A. No.

Mr. Metzger: That is objected to, Your Honor, the testimony about other demonstrations.

The Court: Well, he already answered.

Mr. Metzger: Then I ask it be stricken.

The Court: The aswer was, "No."

Mr. Metzger: I am sorry.

The Court: Do you want that stricken from the record?

Mr. Metzger: No, I am sorry.

[fol. 203] Q. Officer Annitto, are you familiar with the Father Duffy Post of the Catholic War Veterans?

A. No.

Q. Officer Annitto, this picture of Duffy Square is cut off without showing the southern extremity; is that correct? I show you the picture which is the Prosecution's Exhibit 1.

A. There is a little piece missing.

Q. What is the southern end of the Square which is not shown in this picture?

The Court: If anything.

Miss Johnson: I think he testified a little piece was cut off.

The Court: You said, "What is there at it?" and I said, "if anything."

Q. Is there any structure?

A. The sidewalk continues there.

Q. Is there any structure at the southern end of this Square which is not shown on the picture?

A. A little bit of sidewalk.

The Court: I can't even hear you here.

[fol. 204] The Witness: There is part of the sidewalk missing.

Q. Is that the only thing that is missing on this picture, part of the sidewalk? Is that your testimony?

A. Yes.

Q. I show you again the picture.

The Court: Well, there is no building there; is there, sir?

The Witness: No.

Q. And your testimony is there is no structure on the Square south of what is shown on this picture. Is that your testimony?

A. No.

Q. That there is not any structure on the Square south of what is shown on this picture?

A. No.

Q. Is that your testimony?
A. Yes.

Miss Dembitz: No further questions.
Mr. Metzger: All right, you may step down.
[fol. 205] Miss Dembitz: Your Honor, may I approach the bench for a moment?
The Court: Sure.

(Whereupon there was a conference at the bench between Miss Dembitz, Mr. Metzger, and the Judge.)

Mr. Metzger: The People would like to recall Detective Koopman from the Bureau of Special Services.
Miss Dembitz: Can I have one moment to have someone call this person?
The Court: Yes, hold it a minute.
Miss Dembitz: I think there is a problem about this witness; that under the rules of exclusion of one witness while the others, the other witnesses are testifying, I think we have observed that Detective Koopman has been sitting here during the entire case.
The Court: The only difference is that under the rules, where a witness is testifying, he is excluded up to the point where he testifies; but once a witness has testified on either side he is free to remain in the courtroom.
[fol. 206] Mr. Metzger: I would like to point, also, that officer Koopman, while he was in yesterday after his testimony, was not in the courtroom this morning, at all this morning, during any of the testimony. I believe that is correct.
The Court: I will permit him to testify.
Miss Dembitz: I note the objection to his testifying because of his presence in the courtroom yesterday.
The Court: All right, your objection is noted. Overruled.

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Redirect examination.

By Mr. Metzger:

Q. Officer Koopman, you are still under oath.

Court Reporter: Will you please identify yourself, officer?

Officer Koopman: Patrolman Francis Koopman, Shield 22472, Bureau of Special Services.

Q. Were you in the courtroom at all this morning during any time that testimony was taken in this case?

[fol. 207] A. No, I was not, sir.

Q. Officer Koopman, did you take the pictures that were introduced in evidence in the People's case? Have you seen the pictures?

A. I took all the small snapshots.

Q. That will be People's Exhibits 2, 3, 7, and 8; is that right?

(Mr. Metzger hands pictures to the witness on the stand.)

A. Yes, sir, I did.

Q. Fine. And did you develop these pictures?

A. I did not personally develop them. I supervised their processing.

Q. Were you present when they were processed?

A. Absolutely, sir.

Q. And have they been in your custody since the time they were processed?

A. Yes, sir.

Q. Now, Officer Koopman, I would like you to describe—withdrawn. What time did you first arrive in the vicinity of Duffy Square?

A. Well, sir, I had reached the area of Duffy Square at approximately 3:40, 3:45.

[fol. 208] Q. Now, was anything going on in the Square, any demonstrations at the time you arrived?

A. Well, sir, I arrived there directly behind Mr. Laub, and Mr. Luce (phonetic), and Mr. Marks; and they met

with a number of their fellow-colleagues in front of the—I believe it is the RKO Theater there, between 46th and 47th Streets.

Q. That is on the east side of the street?

A. On the east side of the street, yes, sir.

Q. But there was nothing going on in the Square at that time?

A. There were several people whom I know to be members of the May 2nd Committee, who were standing on the Square; and people were handing leaflets between 46th and 47th Streets, unfolding their placards.

Q. Now, sir, will you describe to the Court what happened with respect to this vicinity, Duffy Square, from that time you are now describing until the time that Captain McCallister and Inspector Lewis had some conversation with Mr. Laub and others.

I tell you, before you do that, can you tell us what time [fol. 209] that conversation was? You said you got there about 3:40. What time did the conversation between Inspector Lewis and Laub take place, approximately?

A. That would have been about four or five minutes after four.

Q. Now, all right, between that period of time, the 20 minutes period of time that you were observing this area, what did you see happen?

A. Well, sir, as I said, there were a number of people beginning to gather on the east side of Duffy Square, on the opposite sidewalk, and a number of people were on Duffy Square just standing around, milling around, unrolling the placards they were going to use, and handing out leaflets to passersby.

And, then, about five minutes to 4, the entire group that was over on the east side of the avenue, all started to walk over into Duffy Square; and they all started to gather around, and another large group came. I don't

know where they came from. They were not standing in front of the theater, but they came, and altogether there [fol. 210] were about 2, 4, about 200 people gathered there on the Square; and they were holding up the placards and shouting, "Down with American Imperialism."

Q. Were there any—

The Court: Let him finish. What were they shouting?

A. "Down with American Imperialism," and, "Stop the war in Viet Nam," and things of that nature, having to do with Viet Nam and American imperialism; and they, you know, they were standing out. They were stretched out all over the area, and then Mr. Kunis and Mr. Eckhardt and some other people came alongside, and they were wearing some kind of paper mache, and they had some sort of paper effigy of some sort, which I could not describe.

One of them was beating on a big kettle drum. They were standing off to—as you look at the Father Duffy Statue, to the left of the statue, to the west, towards the west side of Duffy Square. And they were generally, you know, the people were just standing around, shouting and putting these placards up in the air; and I noticed that about—I noticed that a number of people who were [fol. 211] apparently pedestrians on either side of the Square—in other words, on the opposite sidewalk, were stopping to look, and a number of them were shouting, "Go back to Cuba," and "Go home, you communists," and things like that.

Miss Johnson: Your Honor, at this point I would like to object to some of the generalizaztions that the witness is making, as far as what was being shouted. He is not identifying any of these comments.

The Court: As to the later observations, I'll strike them from the record.

Q. Let me ask you one question. Could you estimate at the time you are now testifying about—could you estimate

about how many people appeared to be observing the demonstration in Duffy Square; that is to say, how many people had stopped on the sidewalks of Seventh Avenue and Broadway, the outer sidewalks; that is, the ones nearest to the building line?

A. I would have to estimate.

Q. Yes.

[fol. 212] A. In the thousands. Maybe one thousand, two thousand. Who can tell? At 4 o'clock in Times Square, around that area, there is a lot of people.

Q. All right.

Miss Johnson: Well, Your Honor, I don't know whether my motion was to strike some of the generalities as far as the statements being made and the elements shouting. None have been specified as coming from these specific defendants.

I would like, also, to point to the Court that although this witness was not in court earlier this morning to hear the testimony, in connection with his testimony yesterday he was introduced specifically, as the District Attorney stated on the record at that time, to introduce tape recordings and for no other purpose.

He was present in the courtroom during the testimony of Detective Baher.

Mr. Metzger: I think he was in all day.

[fol. 213] Miss Johnson: And he was also in the courtroom after his own testmony yesterday, in violation of the exclusion of witnesses rule.

The Court: The motion is denied. The Court has already stated its position. You may have an exception.

Miss Johnson: Exception.

The Court: Go ahead.

Q. I was going to ask you, officer Koopman, before the period of time when the captain and inspector approached the leaders of the group, or what appeared to be the leaders of the group, were all the people that appeared to be taking

part in this demonstration—were they all on the Square itself; or, if not, where were they generally located?

A. Well, they were—I don't know if you mean—what happened was they all—when they saw Levy Laub and Mr. Luce and Mr. Copeland going up on the stairs, of course, everybody is jamming, everybody wants to hear what is going to be said. They were in the Square, but they were spilling out into the street, if you understand what I mean; but they were not back far; but they were out wide.

[fol. 214] Q. I see. In other words, perhaps you can indicate the extent or the perimeter of the group.

A. They went to about this—just before the end of this grating here.

Mr. Metzger: That is indicating the southern end of the grating; is that right?

The Witness: Yes, sir.

Q. Yes?

A. And then up to the flagpole, and then out here, unto the side, this way. This is where Mr. Kunis and Mr. Eckhardt set up their effigies.

Q. You are pointing right to the sidewalk?

A. Yes, sir, right over here, between the steps and the street, here.

Q. Were there any people in the street itself?

A. Yes.

Q. This was prior to the inspector and captain coming; is that right?

A. Well, Detective Baher and myself were the only two policemen in the area until about five after four.

Q. All right, now, did you see the defendant Maher at all?

[fol. 215] A. Yes, sir.

Q. Did you ever see him near a horse?

A. Yes, sir.

Q. Tell us what you saw happen. Where were you located with respect to it, and what you saw happen.

A. I was still in the front, directly in front of the steps, in front of Father Duffy Statue, taking my wire recording,

and I heard Mr. Laub shout over the megaphone something about horses, and I turned around and I saw the two horses coming up on the sidewalk; and Mr. Maher passed me.

Q. What direction was he going, away from or towards the horses?

A. Towards the horses.

Q. All right.

A. And I saw him strike the horse with this rolled-up thing. I think it was a placard. He smacked the horse, and then some other man, a tall man with olive skin, black hair, who had on like a gray, checked jacket, he turns around and he rolls himself in a ball and rolls right underneath the [fol. 216] horse; and at that time I took off and got away from the general area because—

The Court: Not because. Period.

A. I took off and got out of that general area.

The Court: Of course, this is not a new matter. He already testified to that yesterday on direct examination.

Mr. Metzger: I was just clearing up one or two points.

The Court: But I am talking about this point, about what he observed Maher do to the horse. That, he testified to yesterday.

Mr. Metzger: All right, your witness.

Recross examination.

By Miss Dembitz:

Miss Dembitz: Your Honor, in view of this testimony that has been given on direct examination, I'll have to cross-examine on a few points, although it may be somewhat repetitious.

The Court: That is your right. Go ahead.

Q. Officer Koopman, you testified that there were people [fol. 217] on the pavement on Broadway and on Seventh Avenue; is that correct?

A. Yes, ma'am.

Q. Did you tell these people to move on?

A. Did I tell them, ma'am?

Q. That is the question; yes or no?

A. No, ma'am.

Q. Did you hear any officers tell these people to move on?

A. I didn't hear anything from the middle of Duffy Square, ma'am.

Q. Did you see these people walking up and down the street on Seventh Avenue and on Broadway?

A. I did see people walking.

Q. Did you see people walking up and down the street on Seventh Avenue and on Broadway?

A. Yes, ma'am.

Q. Officer Koopman, you testified that the gathering was primarily over the grating of the subway; is that correct?

A. Yes, ma'am, and out to the left and right.

Q. You testified it was out to the left and the right, and I [fol. 218] believe you testified that you believed—that you observed some people on the street; is that correct?

A. That is correct, ma'am, yes.

Q. Did you tell these people to get back on the sidewalk?

A. No, not I, ma'am. I did not.

Q. Did any officer tell these people in your hearing to get back on the sidewalk?

A. Well, after the policemen came over, yes, I heard them telling them.

Q. I am speaking of the time that you were speaking about, which is when the speeches were being made by Mr. Laub, Mr. Luce, and Mr. Copeland. Did you hear any of the officers tell the people to get back on the sidewalk?

A. No, ma'am, I did not.

Q. Officer Koopman, isn't there a flow of traffic on Broadway and Seventh Avenue, vehicles?

A. Yes, ma'am.

Q. Would it in your opinion, or in your observation, let me say—I withdraw that. In your observation at that time,

would it have been—I am sorry, Your Honor, I am afraid [fol. 219] I can't formulate the question in the proper form. Just one further question. You have testified that Mr. Maher hit a horse.

A. Yes, ma'am.

Q. Is that correct? Where did he hit the horse? What part of the horse's anatomy did he hit the horse?

A. Well, I don't know what you call it. I would say the chest section, ma'am, on the forefront.

Q. Was the horse rearing on its hind legs?

A. Yes, ma'am, it did rear up.

Q. With the horse having its front legs in the air, up like this?

A. Yes, ma'am.

Q. Was Mr. Maher in front of this horse with its legs up in the air like this, the horse's legs? Was Mr. Maher standing in front of the horse which had its legs up in the air like this?

Miss Dembitz: And counsel is indicating with her arms over her head, like a horse with its legs raised.

Q. Is that where Mr. Maher was standing?

A. He was standing to the side of the horse, ma'am; in [fol. 220] other words, to the front and to the side.

Q. Your testimony is that the horse was standing with its front legs raised in the position which we commonly call "prancing"; is that correct?

The Court: Do you understand what the word *prancing* means?

The Witness: It means walking around on its hind legs, as I understand it, Your Honor.

A. What happened was, he struck the horse; the horse reared up; and he was standing right next to the horse.

The Court: That is exactly what we are trying to clear up. When did the horse raise its front legs; was it before he was struck, or was it after he was struck with this placard?

The Witness: It was after he was struck with the placard, sir.

Q. Officer Koopman, there has been testimony here that these horses were being used to move the crowd. How were they being used to move the crowd. What were their physical movements for the purpose of moving the crowd?

[fol. 221] Mr. Metzger: Your Honor, I would object to the form of that question.

Miss Dembitz: Well, I am referring to previous testimony, Your Honor, that was introduced by the district attorney; that they were being used to move the crowd.

Mr. Metzger: I never introduced such testimony.

The Court: I will permit it.

You may answer. Did you observe the horses of the mounted police trying to do something to control this crowd of demonstrators?

The Witness: Yes, sir, I did.

Q. What were the horses doing?

The Court: What were they doing?

The Witness: Well, they have some sort of way—

Q. On the Square.

A. They have a way of making these horses move sideways into a group; and two of them stay close together and they just move that way; and they can take the place of about ten officers moving in the same direction.

[fol. 222] Q. Were these two horses moving into the middle of the Square, where the assembly of people were standing; is that your testimony?

A. The assembly was already scattering when the police —I gave this testimony yesterday. The patrolmen entered the Square first, from the east side of Duffy Square. They started to try to move the people out of the Square. They were requesting the people to leave. What happened was, they would start to move into the crowd, and the people

would run around them and come from behind them. They ran out into the street.

Q. This is not responsive to my question.

A. And then the horses came up behind the police officers to try and get better control of the crowd.

Q. I am not asking you what they were trying to do. I am asking you what were the movement of the horses on the Square.

A. They were moving sideways on the Square, from east to west.

The Court: Did you observe—you told us about these [fol. 223] pedestrians that were walking up and down Broadway and Seventh Avenue. As a result of this shouting you say you heard and the other things that were going on there at Duffy Square, did you observe whether or not a crowd was caused to collect?

The Witness: Yes, sir. The people were standing there on both the east and the west sidewalks, next to the building, looking in our general direction; and I can only—

The Court: About how many people would you estimate stopped to look over what was going on at Duffy Square?

The Witness: I would say about 2000.

The Court: Any further questions?

Miss Dembitz: No, Your Honor.

The Court: You may step down.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Metzger: Your Honor, after the Court adjourned, or recessed, yesterday, I had a conversation with Miss Condon with respect to the Administrative Code violation; and she told me at that time—and I think you are still correct in what you said—that the defendants Laub and Cope-[fol. 224] land will stipulate that they had no permits to use these sound devices. I am prepared, however, to offer testimony that they had no such permits, if the Court wishes, in addition to the stipulation here.

The Court: Is there such a stipulation, please?

Miss Condon: So stipulated, without prejudice to any other motions that would be addressed to the People's case on the Administrative Code violations.

The Court: All right.

Mr. Metzger: Your Honor, that is the People's case.

The Court: With reference to the getting past the stipulation as to the Administrative Code violation, is there any stipulation as to whether or not there was a permit to permit this meeting at Duffy Square?

Miss Condon: This is only as to sound.

Mr. Metzger: So far we are only up to that point.

[fol. 225] Your Honor, there is no such stipulation. However, at this time—there is no stipulation, Your Honor, that there was no permit to demonstrate within the park itself.

Miss Dembitz: I object to the characterization of this area, Your Honor. It has been known in this case as Duffy Square. That is the only characterization I could consent to.

Mr. Metzger: I ask the Court to take judicial notice of one regulation of the City of New York, coming under the Rules and Regulations of the Department of Parks, with respect to the meeting, Section 21 (a).

Miss Dembitz: Your Honor, I object to any reference to the Park Department Regulations. These defendants are charged, among other things, with congregating on a public street and refusing to move on.

They cannot be charged with congregating on a public street and refusing to move on, and at the same time have [fol. 226] any relevance to any Park Department Regulations. Furthermore, it is completely outside of the issues of this case.

Mr. Metzger: Your Honor, may I say—

The Court: Objection overruled.

Mr. Metzger: I just want to say one thing with respect to that. There is no charge of using the park without a per-

mit, but it may very well be material, particularly when the actions of the police officers in this case are brought into issue as to what the law might or might not be with reference to certain activities in certain places.

I ask Your Honor to take notice of Section 21 (a), Sub. (a) entitled, "Meetings, etcetera," which to paraphrase—well, I will just offer this section and ask the Court to take judicial notice of it, rather than read the section.

Miss Dembitz: I object on the ground it is entirely immaterial; and the District Attorney has not pointed out, sir, [fol. 227] if I may say so respectfully any permit—(interruption)

Mr. Metzger: Well, if Your Honor feels it is—(interruption)

The Court: The Court will take judicial notice. Tell us the particular part you want the Court to take judicial notice of.

Mr. Metzger: "No person shall hold any meeting, make a speech, address, oration, or distribute any signs—" and I am picking words out of here and leaving other words out, "placards, notices, etcetera, in any park or upon any park street, except by permit;" subdivision 2, "such permit will be issued unless the use for which the permit is sought is of a private or commercial nature, or (b) the location is not suitable because the area is specially landscaped and planted with botanical flowers, etcetera, or (c) the location is not suitable because it is a specialized parking area, such as a zoo, etcetera, or (d) the date and time requested has been alloted by permit or would obstruct or interfere substantially with park use and enjoyment by the public;" and [fol. 228] subdivision 3, Your Honor, which is most important, "Whenever a permit is denied by reason of these other reasons, alternate suitable locations and dates shall be offered the applicant."

Miss Dembitz: Your Honor, we are taken completely by surprise by this offer at this time. We would have conducted a cross-examination of the Prosecution's witnesses

along additional lines if we had any notice whatsoever that there was to be any type of allegation of this sort.

We consider it entirely outside of the issues of the case, because of the charge that I already mentioned, the congregating on a public street; furthermore, there has been no evidence introduced, whatsoever, that this is a park or is within the jurisdiction of the Park Department.

But my major objection is that we have not had an opportunity to cross-examine the prosecution's witnesses with [fol. 229] respect to matters that would be relevant if this offer—if this regulations were relevant.

Mr. Metzger: Your Honor, may I say one thing with respect to this. I don't know what misapprehension the Defendant's counsel is operating under. There is no charge in this case, as perhaps there might have been, but there is no charge that these people gathered and held a meeting in violation of the Department of Parks Regulations. This is not the issue in this case.

However, it was brought to issue, I think by the Defendants, that the conduct of the police—and I think that this is going to be the thrust of their case—and I am anticipating it at this time—that the conduct of the police was improper in asking these people not to hold a meeting.

Now, I don't think that that is terribly material since the charges are Disorderly Conduct, and certainly anything the police might have done does not justify anyone in the [fol. 230] commission of a crime. Nevertheless, what regulations control certain activities are very relevant to whether the police acted reasonably in one situation and not reasonably in another situation.

As to this regulation here we only ask the Court to take judicial notice of the regulations, merely to show that this regulation exists; and it may very well be connected later to explain or justify certain activities by the police if those activities are called into question by the Defendants.

The People are interested only in this case, in proving that each defendant specifically committed an act or con-

ducted himself in such a manner as to violate Section 722 and no other section, other than the two defendants that are charged with using sound devices.

This is not a prosecution based on the Department of Parks Regulations, nor is it a civil action or anything that would bring these regulations into purview for any other reason but those that I have stated.

[fol. 231] Miss Dembitz: Your Honor, the District Attorney is contradicting—in effect he is contradicting his own witnesses, who testified that Captain McCallister stated that the meeting could not continue because of the effect on traffic.

Mr. Metzger: I don't think that is contradictory. That is part of the whole gesthalt in this case.

The Court: Is there any doubt that Duffy Square is a park?

Miss Dembitz: Pardon me?

The Court: I said, is there any doubt that Duffy Square is a public park under the jurisdiction of the Park Department of the City of New York.

Miss Dembitz: Yes, Your Honor.

The Court: Yes?

Miss Dembitz: Yes, Your Honor.

The Court: What is that?

Miss Dembitz: There is doubt.

The Court: Very well. Then, in order for me to take [fol. 232] judicial notice of this, you will have to establish that this is a public park, unless there is a stipulation.

Mr. Metzger: Your Honor—

The Court: How can I take judicial notice to something that relates to a public park in the City of New York, unless you submit proof that this is a public park?

Mr. Metzger: Is I said before, Your Honor, this is not a prosecution based on—

The Court: I understand. I understand. I have got ears, and I heard; but you are asking me to take judicial notice of something that applies to public parks, which I am pre-

pared to do provided you have proof here that Duffy Square is a public park.

Mr. Metzger: I am ready, willing, and able to prove that it is a park.

The Court: All right, fine.

Mr. Metzger: But may I just say, Your Honor, that even if it wasn't a park—Your Honor, even if it was private property—

[fol. 233] The Court: I understand all that, but I have a record to protect here.

You are asking me to take judicial notice of a Park Department regulation which refers to public parks, and before I can do that I have to have before me—unless it is stipulated—that Duffy Square is a public park.

Mr. Metzger: All right, Your Honor. Then, Your Honor, with the exception of that last offer of proof which unexpectedly came up, the People have presented their case against all the defendants on all charges.

The Court: I will take judicial notice of it subject to connection.

Mr. Metzger: Yes, Your Honor, thank you.

The Court: And subject to that connecting, is that the People's case as to all defendants?

Mr. Metzger: It is, Your Honor; that's right.

The Court: All right.

[fol. 234]

MOTION FOR DISMISSAL AND DENIAL THEREOF

Miss Dembitz: At this point we move for dismissal of the Complaint on the basis that the evidence shows no violation of Section 722; does not establish a prima facie case against any of the defendants; and furthermore, that a conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech, free assembly, and due process of law. And if your Honor wishes to hear argument on this I am prepared to argue it.

The Court: That is completely up to you. If you wish to submit any further argument the Court is prepared to hear you. That is up to you. I leave that entirely to your discretion.

Miss Condon: While counsel is conferring; on the Administrative Code violations I am reserving my motions to the end of the entire case.

The Court: Very well.

Miss Dembitz: Your Honor, the problem in my mind about addressing the argument to you, which you con- [fol. 235] sented to hear, is that in the event that our motion is not granted at this time I would want to renew our argument and our constitutional objections at the close of our case; and, of course, I wouldn't want to burden Your Honor with respect to the repetition of the same argument.

Now, that is my quandry.

The Court: Do you prefer to reserve it until the end of the case?

Miss Dembitz: Well, yes, Your Honor, perhaps that would be best.

The Court: Then you are now moving with respect to the disorderly conduct case, as I unders and it; that is, as to defendant William Turner and 16 others? Is that correct, Miss Dembitz? Is that your motion?

Miss Dembitz: Yes, Your Honor.

The Court: The motion is denied as to each defendant. And Miss Condon, representing the defendants Laub and Copeland in the Administrative Code violation, that is, Calendars 52 and 53, has reserved whatever motion she was [fol. 236] to make with reference to those two charges until the end of the case.

[fol. 235A]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966, No. 399

TURNER, et al, Petitioners,

v.

NEW YORK, Respondent.

STIPULATION OF COUNSEL—Received January 16, 1967

In View of the Fact that the transcript of the testimony of Witness Philip Luce in the above entitled case includes his testimony that he works "for the American Civil Liberties Committee" (Page 254 of typewritten transcript), and upon the representation of Nanette Dembitz, Counsel for Petitioners, that no such organization exists, that Mr. Luce has never worked for the American Civil Liberties Union and that his employment was in fact by the Emergency Civil Liberties Committee

It Is Hereby Stipulated and agreed by and between Counsel for the parties that Mr. Luce's testimony should be deemed to refer to the Emergency Civil Liberties Committee instead of the "American Civil Liberties Committee".

Nanette Dembitz, Counsel for Petitioners;

Honorable Frank S. Hogan, per (Signature illegible), District Attorney, New York County, Attorney for Respondent.

Dated: New York, New York, January , 1967.

PHILIP LUCE was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated, please. Give your name, address, and occupation.

[fol. 237] The Witness: Philip Luce, 504 West 55th Street, associate editor of the Publication Rights For the Emergency Civil Liberties Committee.

The Court: Am I correct? I have been informed that Miss Shallit and the Defendant Maher are now in the court; is that correct?

Miss Dembitz: Yes, Your Honor.

The Court: Thank you. It is 12[illegible]. All right, you may proceed.

Philip Luce, is that your name?

The Witness: Yes, sir.

Direct examination.

By Miss Dembitz:

Q. Mr. Luce, on the afternoon of August 8, were you at Duffy Square?

A. Yes, I was.

Q. At approximately what time did you arrive at Duffy Square?

A. At approximately 3:45.

Q. Were you one of the organizers of the meeting held at Duffy Square?

A. Yes.

[fol. 238] Q. Or one of the leaders of the meeting held at Duffy Square?

A. Yes, I was.

Q. What was the first thing that was done to organize the meeting on Duffy Square?

A. (No response.)

Q. At Duffy Square.

A. When we arrived we had arm bands passed out to certain individuals of our committee and of the group, who were in charge, specifically, of making certain that everyone stayed within the limits of Duffy Square; that they didn't go out into the street. These people were also in charge of keeping the crowd orderly, of insuring that no provocateurs caused any kind of an incident while we were on the Square.

Q. About how many people were given arm bands?

A. It would have to be an approximation, but I would say approximately 20 to 25.

Q. And where did these approximately 20 people station themselves?

A. They were in a semicircle, behind and around the people that had gathered there for the speeches.

[fol. 239] Q. And approximately how many people would you say were gathered there for the speeches?

A. Somewhere between 100 and maybe 150.

Q. Did you see placards distributed at this meeting?

A. Some people came with posters, poster boards with various signs written on them. I am not certain whether they were passed out on Duffy Square.

Q. Did you see placards being held in the air by the people who were assembled there?

A. Yes, I did see placards.

Q. Mr. Luce, I call your attention to the period prior to the holding of the meeting on Duffy Square, on August 8, and ask you whether you had any conversation—whether any conversation was held by telephone with any police officer.

Mr. Metzger: I am going to object, Your Honor.

The Court: Objection sustained.

Miss Dembitz: Exception.

Q. Mr. Luce, will you please describe—you testified that [fol. 240] arm bands were distributed; that persons—that there were approximately 20 people with arm bands, who

were arranged in a semicircle. Will you please state how the meeting was opened?

A. The meeting was opened—

Q. What was the first thing that happened; in other words, what was the first thing that happened at this meeting to begin with?

A. Prior to the speeches Mr. Laub began the meeting by making a statement that we were going to hold a peaceful, orderly meeting, in Duffy Square. He then introduced me, and I said a few words on behalf of the May 2nd Committee, I believe it is, or May 2nd Movement, and turned over the proceedings to Mr. Copeland.

Q. What happened then?

The Court: You say you spoke for what movement was that?

The Witness: The May 2nd Movement.

The Court: And what is the May 2nd Movement?

The Witness: The May 2nd Movement is a movement which was formed at Yale University in March of this year. [fol. 241] It is a radical, peace organization. Its primary purpose, as was discussed at Yale on its founding, was to attempt to end the war, the present war going on at Viet Nam.

The Court: All right.

Q. Mr. Luce, you were standing on the steps of the—the southern steps, south of Father Duffy, were you not?

A. Yes, I was.

Q. You observed the people assembled to hear the speeches, that were to the south, did you?

A. Yes.

Q. Did you hear in the people assembled to the south of you pushing, shoving, wrestling, fisticuffs, or violence of any sort?

A. No.

Q. Did you observe that any of the people standing in that assembly were holding rocks, bottles, or any other kind of weapon or implement, other than placards?

A. Absolutely not.

Q. Did you observe whether or not this entire assembly was on the Square or was in the street?

[fol. 242] A. It was on the Square.

Q. Did you observe whether there was any diversion or interruption of vehicular traffic?

A. There was none.

Mr. Metzger: I can't hear him.

The Witness: There was none.

Q. Will you please continue to describe what happened after the speeches, after the introduction by Mr. Laub and the remarks by you and the opening remarks by Mr. Copeland, to which you have already testified?

A. To the best of my recollection, as Mr. Copeland began to speak, he had only spoken for maybe 15 seconds, 20 seconds, when a police officer appeared and said that the meeting will have to be stopped; that it was an illegal meeting.

Mr. Laub, if I am not mistaken—

Q. Can you repeat—repeat to the best of your recollection the exact words that the police officer used.

A. I think he simply stopped and yelled, "This is an illegal meeting and has to be stopped immediately. You have no right to hold a meeting in Duffy Square.

Q. And then what happened?

[fol. 243] A. Then Mr. Copeland continued to speak. I am not certain if the policeman left and reappeared, or stayed there, but at one point Mr. Laub then took over from Mr. Copeland, and said, that he would repeat for the crowd what the police officer had said.

The police officer then made certain comments, referring to an illegal demonstration being held within Duffy Square. Mr. Laub repeated these comments to the assembled people there.

Q. Now—

The Court: Let him continue so we'll have his version.
Miss Dembitz: Yes, Your Honor.
The Court: Go ahead.

A. As Mr. Laub was speaking and was relating what the policeman said, the people were orderly. There was no disturbance at that point that I can recall at all. After Mr. Laub had spoken, then the policeman said something to the effect that this rally would have to be dispersed immediately. The people did not move, and to the best of my recollection Mr. Laub continued to speak. At this point, [fol. 244] again to the best of my recollection a policeman appeared, I assume, from behind the statue of Father Duffy; but at least, there appeared two horsemen on horseback; and suddenly rode into the crowd. At this point the police began arresting those who were gathered on the steps, the speakers. They arrested Mr. Copeland and Mr. Laub at that point.

Q. Were you arrested, Mr. Luce?

A. I was not.

Q. Did you absent yourself from Duffy Square when the police arrived?

A. I stood in Duffy Square and watched what was going on.

Q. And then what did you do?

A. Following that I crossed the street, the north—let's see, which would it be the 47th or 48th Street?

Q. You crossed?

A. I crossed to the side of the street where the Castro convertibles are.

Q. You crossed to the southwest corner of 47th and Broadway?

A. The southeast corner.

Q. The southeast corner of 47th and Broadway?

[fol. 245] A. Yes.

Q. Did you have any difficulty crossing the street?

A. I had no difficulty crossing the street. I made a phone call there. I then returned back to Duffy Square, observed

more of the happenings there, and I then crossed the street to the east side of Broadway, on 47th Street, and watched the endings of the proceedings.

Q. Mr. Luce, addressing my question, again, to the conduct of the crowd of the assembly while the speech was being made, was there shouting during the making of the speeches, before Captain McAllister's order?

A. To the best of my recollection there was no noise, except for the speakers.

Q. Addressing yourself to the period before the meeting, was there any pre-arrangement with respect to this meeting with the police?

Mr. Metzger: Objection.

The Court: The question is vague to me.

Miss Dembitz: Well, Your Honor, I attempted to elicit [fol. 246] testimony on this point before by asking the witness whether there had been a telephone conversation with the police officer; and that question was objected to.

The Court: And I sustained it.

Miss Dembitz: I am therefore trying to state it, without leading the witness at all, by making it very general and asking if there was any kind of pre-arrangement or pre-conversation; and I put it in that general way, so as to not lead the witness.

The Court: I just want to understand what the question is. The objection is sustained.

Did you have a permit for this meeting?

Miss Dembitz: Your Honor—

The Court: I want to ask that. Did you have a permit to conduct this meeting at Duffy Square?

The Witness: To the best of my knowledge, no, sir.

The Court: You were the chairman of the meeting, were you not?

[fol. 247] The Witness: Yes, sir.

The Court: And as I understood your testimony, you were one of the persons in the committee who organized this meeting?

The Witness: Yes, sir.

The Court: So that if a permit had been sought you would certainly know about it, would you not?

The Witness: Yes, sir.

Miss Dembitz: Your Honor, in view of your questions, will you now permit me to ask the question which I attempted to ask, which was, was there any conversation with the police about the holding of this meeting prior to the assembly?

The Court: Is that the same question of an alleged telephone conversation with an unidentified person in the police department? Is that the gist of your question?

Miss Dembitz: Well, the gist of the question is directed as to what this witness can tell us about the conversation that was held.

[fol. 248] The Court: The objection is sustained. The Court will adhere to its ruling.

Q. Now, Mr. Luce, addressing yourself to the period after Captain McCallister spoke to you, Mr. Laub, and Mr. Copeland, you have already testified that a number of policemen appeard on foot, as well as two on horseback. About how many, to the best of your recollection and estimation, about how many policemen appeared on foot?

A. At the first instance, I would say that maybe 12. Sometime later there might have been an additional eight or ten; but that is a very rough estimate.

The Court: Are you talking about uniformed policemen?

The Witness: Yes, sir.

Q. Mr. Luce, do you recall—Mr. Luce, there has been testimony here that these policemen engaged in attempting to disperse the people gathered on Duffy Square. Do you recall whether the policemen had clubs in their hands when they were attempting to disperse these people on Duffy Square?

Mr. Metzger: I am going to object to this as being [fol. 249] leading and suggestive.

The Court: Objection sustained.

Q. Do you recall the manner in which the police behaved? I withdraw that. Do you recall the circumstances and activities of the police in attempting to disperse the assembly and in making arrests?

Mr. Metzger: Your Honor, I am going to object to that as being too vague and general, the manner in which the police made arrests. If he can say what he saw specifically—

Miss Dembitz: I believe I said what were the activities of the policemen.

The Court: That is in essence what she is asking. So, the objection is overruled.

Q. Do you recall the activities of the policemen in asking people to disperse and in thereafter making arrests?

A. Yes. Some of the people that I saw arrested were not asked to disperse, but were simply arrested. The police upon approaching the speakers who were standing there, were generally shoving their way through the spectators that were gathered at the demonstration. As they arrested certain of the speakers, I saw that. I then left the Square, [fol. 250] and upon re-entering the Square, after making a phone call, I saw the horses and the policemen functioning within the Square.

Q. What did you observe the horses to be doing—or the policemen on horseback?

A. The policemen on horseback were generally trying to break up any gathering of more than two people, or one person.

Q. How were they attempting to break the gathering?

A. By riding the horses into them.

Miss Dembitz: Just one moment, Your Honor.

The Court: That is all right.

Miss Dembitz: No further questions, Your Honor.

Cross examination.

By Mr. Metzger:

Q. Mr. Luce, did you see Levi Laub speaking near the statue?

A. Yes, sir.

Q. Did you see whether or not he was using any instru-
[fol. 251] ment to speak with?

A. Yes, sir.

Q. What was he using?

A. He was using a hand megaphone.

Q. When you say a hand megaphone, you mean that he held it in his hands?

A. Yes.

Q. Was it an electric megaphone?

A. I think it was battery.

Q. Did it look anything like this megaphone I am holding in my hand?

A. Similar.

Miss Condon: I object to it; "Did it look anything like this?" as being too vague a question.

The Court: The objection is overruled.

Miss Condon: Exception.

Q. Your answer was yes?

A. It was similar, yes, sir.

Mr. Metzger: Indicating People's Exhibit—I think this
[fol. 252] is 9, in any event.

The Court: I will tell you in a minute. You are right. That is People's Exhibit 9, deemed marked.

Q. What about Mr. Copeland, did you similarly see him use a megaphone similar to this one that I showed you now?

A. Yes, sir.

Q. I see. Do you see that man standing in the court-room?

A. Yes, sir.

Q. Have you ever seen him before?

A. (No response.)

Q. Did you see him before the 8th of August? Do you recognize him again?

A. Before the 8th of August? He is familiar.

Q. He is familiar?

A. Something about his—

(Officer Koopman puts on his eyeglasses.)

A. That is a little better. Yes, I think I recognize him.

Q. You have seen him before the 8th of August?

[fol. 253] A. Before the 8th of August? I don't recall. I don't recall.

The Court: So the record will indicate who we are referring to, will you identify the officer or whoever it was who stood up, for the record?

Mr. Metzger: That was Officer Koopman, who has already testified.

The Court: I know it, but the record does not.

Mr. Metzger: I know you know it.

Q. Do you recognize this man?

A. Yes, sir.

Q. Had you seen him prior to the 8th of August?

A. (No response.)

Q. Is there anything about him that you might find familiar?

A. I think I have seen the gentleman, yes.

Mr. Metzger: Indicating Detective Baher (phonetic).

Q. What do you do for a living, Mr. Luce?

Miss Dembitz: Objection.

[fol. 254] Miss Johnson: Objection. That has already been answered.

Mr. Metzger: Not to my question it hasn't.

The Court: Objection overruled.

Miss Johnson: His objection has been listed.

Mr. Metzger: Why the strenuous objection?

Miss Dembitz: It is immaterial. There is a further objection to this.

The Court: The objection on that ground is overruled.

Q. Mr. Luce, what is your occupation?

A. I work as associate editor for the American Civil Liberties Committee.

Q. Are you paid? Is that a salaried occupation?

A. It was until September the 15th.

Q. What happened after September 15? What do you do?

A. At the moment I am looking for a job.

Q. Looking for a job? All right. Have you ever been [fol. 255] convicted of a crime?

A. No, sir.

Q. Now, Mr. Luce, at the time that this meeting commenced, at the time that the speakers began to speak, you testified there were approximately 100 to 150 people on Duffy Square; is that correct?

A. Yes, sir.

Q. Now, I show you People's Exhibit 1, which is a picture of Duffy Square, and ask you if you could approximate the perimeter on which you say these people were standing at the beginning of the speeches, by pointing out on the picture?

A. There were people standing on the steps. There were people standing between the two flagpoles and probably to the light post.

Q. And would you say there are 100 to 150 people there?

A. Approximately.

Q. And were you right up in the front; is that right?

A. Yes, sir.

Q. And you say Mr. Laub first started speaking; is that right?

[fol. 256] A. Yes, sir.

Q. Did you look at him? Did you see that he was speaking?

A. Yes, sir.

Q. I see, and then you say you yourself took the—did you speak into the horn, by the way?

A. Yes, sir.

Q. And then you say Mr. Copeland was speaking?

A. Yes, sir.

Q. I see, and during this period of time you were able to observe, and you can testify and have testified that you saw no one off the Square? You were able to keep the entire Square and all these people under observation during this period of time; is that correct?

A. Not all of the people, no, sir. To the best of my recollection—

Q. Some of them might have been on the street, that you couldn't see; is that correct?

A. It is possible.

Q. And that would be the same with respect as to whether or not there was shouting or shoving; is that right?

[fol. 257] A. No.

Q. Well, would you say it was very quiet at this time?

A. I would say that as myself and Mr. Laub were speaking there were no outbursts; there was no shouting.

Q. When were these outbursts?

A. If there was any noise at all, it didn't take place until—following Captain McCallister's request that the meeting be dispersed.

Q. You mean that this group of 100 to 150 people, in your own estimation, and all arriving at different times and from different locations with respect to the Square were absolutely quiet up until the time that the captain and inspector first appeared on the scene; is that your testimony?

A. To the best of my recollection, yes, sir.

Q. All right, let me ask you this. Did you have occasion to observe the sidewalks, Mr. Luce, on the opposite side of the street; that is, where the buildings are on Broadway and Seventh Avenue, along by, say, the theater on that side. Did you see those sidewalks during the meeting?

[fol. 258] A. During the speeches?

Q. Yes.

A. I think so, yes, sir.

Q. What about the—before the speaking, when the people were gathering around?

A. Yes.

Q. Did you notice whether or not there were people on those sidewalks?

A. I can recall, let's see, it would be on the west side of the Square—I am not sure what street that is, that there were the normal Saturday afternoon clientele. They were walking up and down the street.

Q. You spend much time in Duffy Square?

A. I have been there.

The Court: We'll take a recess now, until 2 o'clock. You may return at 2 o'clock.

(Whereupon the Court recessed until 2 p.m. for lunch.)

(Whereupon Court reconvened after lunch recess, 2 p.m.)

Bridge Officer: All rise. Be seated.

[fol. 259] Continued case.

Mr. Metzger: Your Honor, at the beginning of the luncheon recess I was cross-examining the witness Luce. Now, I have here a witness which is part of the People's case, where the People's case was left open for connection. I would like to put him on now before I continue.

The Court: All right.

Mr. Metzger: So that he can leave. People call on Mr. Auerbach.

Bridge Officer: Raise your right hand and face Your Honor.

DANIEL AUERBACH was called as a witness on behalf of the People, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. Name, address, and occupation.

The Witness: Daniel A-u-e-r-b-a-c-h, 20-10 Seagirt Boulevard, Far Rockaway, New York, employee of the Department of Parks, City of New York.

The Court: Hold it a moment, please. All right. All [fol. 260] right.

Mr. Metzger: There is a further motion, Your Honor, other than the witness Luce, that any other witnesses who are to testify and who have not yet testified to be excluded.

The Court: Any witnesses on this case, on both sides, who have not testified, are excluded from the courtroom until called. That does not apply to Mr. Luce. He is on the stand.

Direct examination.

By Mr. Metzger:

Q. Mr. Auerbach, what is your position with the Department of Parks?

A. I am special assistant to the Borough Engineer of Manhattan Maintenance Division.

Q. How long have you been with the Department of Parks?

A. Three and a half years.

Q. Have you recently familiarized yourself with the park known as Duffy Square Park?

[fol. 261] A. Yes, sir.

Q. Now, I am going to show you a picture. This is People's Exhibit Number 1, and I ask you to show to the Court in detail the extremities, outer limits, perimeter of Duffy Square Park, that park which comes within the jurisdiction of the Department of Parks, City of New York.

A. The boundaries or jurisdiction of Duffy Square Park are 46th to 47th Street, Broadway to Seventh Avenue, curb to curb.

Q. And that would include then the entire part of the park picture in People's Exhibit Number 1?

A. Yes, sir.

Q. All right, now, Mr. Auerbach, have you had occasion to examine the records of the Department of Parks with respect to the issuance or application for the issuance of permits to hold meetings in this park?

A. Yes, sir.

Miss Dembitz: I object, Your Honor, to that testimony, because it is not related to the issues of this case, and there has been no allegation on the Complaint or notice to [fol. 262] the defendants that any such issue was involved.

The Court: Objection overruled.

Q. Did you find, Mr. Auerbach, whether a permit had been issued for the 8th day of August, 1964, for a meeting of any kind or whatever nature for Duffy Square Park?

A. No.

Q. There had been no permit issued; is that right?

A. No, sir, no permit was issued.

Q. Was there an application made?

A. No, sir, there was no application made.

The Court: All right.

Mr. Metzger: Your witness.

Cross examination.

By Miss Dembitz:

Q. Mr. Auerbach, now, this is People's Exhibit 1, the picture of Duffy Square.

A. Yes, ma'am.

Q. Addressing—directing your attention to this area of

the Square, and I am indicating the area on the picture to the south of the steps, on which there is a grating.

A. Yes, ma'am.

Q. Could you tell us, Mr. Auerbach, if there is any [fol. 263] unique usage made of this area?

A. This grating?

Q. This area to which I am pointing, indicating the area of the grating.

A. I don't understand your question. Used for what purpose?

Q. I am asking you whether there is any use of this area.

Mr. Metzger: That is objected to.

The Court: We are having the same difficulty he is showing to you.

Miss Dembitz: I am sorry I am awkward about this. I am trying to show him a picture. Maybe if I can stand over here.

The Court: Any place, so we can all hear.

Miss Dembitz: Perhaps if I stand here and indicate the picture. The trouble is the picture is not that big.

Q. Mr. Auerbach, I am indicating the area south of the steps on Duffy Square.

A. Yes, ma'am.

[fol. 264] Q. And I am asking you whether of your own knowledge and the position that you occupy there is any usage made of this part of Duffy Square.

A. A grating of that sort normally indicates an air vent for subway service.

Q. Thank you. Now, in your capacity, Mr. Auerbach, with the Park Department, have you personal knowledge of assemblies of any sort that have been held in Duffy Square?

Mr. Metzger: I object to this as not being material.

The Court: The objection is sustained.

Miss Dembitz: Well, then, Your Honor, I would like to make an offer of proof to this respect, which I think is

highly material to this case; that if this witness were allowed to answer this question he would testify that there are frequent meetings on Duffy Square; that annually the Father Duffy Chapter of the American War Veterans holds a memorial meeting on Duffy Square, at which hundreds of people gather; that this meeting is held in May [fol. 265] of every year; that there is also at frequent intervals and have been within the past few years rallies on Duffy Square for the purpose of selling United States Government Bonds. That is my offer of proof.

Mr. Metzger: May I say, Your Honor, that this witness has been called to testify as to the jurisdictional limits of the park and as to whether or not the records of the Parks Department indicate a permit having been issued on a certain date.

There would be no possible way that anybody would know what he would testify to; and, therefore, I object to this sort of testimony.

The Court: Objection sustained.

Miss Dembitz: We have no further questions.

Mr. Metzger: Thank you. Now, Your Honor, that is the close of the People's case. Now, if Your Honor will permit me to continue the cross-examination of Mr. Luce.

The Court: Yes.

[fol. 266] Cross examination.

By Mr. Metzger (continued):

Q. Now, if I recall, Mr. Luce, you are still under oath, by the way. As I recall, you had told me that people on the sidewalks, on the outer limits of this area, along the building lines, were the usual clientele for that time of day. I believe I asked you whether you had been in Times Square—or Duffy Square—often, and I believe that you said that you had. Do you recall that?

A. With one correction. I only said that I saw people march—or people moving on the west side, which I assume is Seventh Avenue. I am not certain.

Q. Broadway?

A. Broadway, the west side; that is correct.

Q. Did you at any time see people stop on these sidewalks to look at the demonstration?

A. Yes, I did.

Q. How many people would you estimate you saw stopping on the sidewalks at any given time?

A. After the speaking was through? When I was on [fol. 267] the sidewalk myself? On the east side, which I assume is the Seventh Avenue side?

Q. Over by the theater.

A. Yes.

Q. The RKO.

A. Yes. I did see people standing on the sidewalk, watching.

Q. How many people?

The Court: Let him finish.

Mr. Metzger: Actually, I asked him how many people.

The Court: But he started to say he saw people standing, watching; and then you interrupted.

All right go ahead.

The Witness: I have no way of knowing now the exact number. I would say that, because there was at that point noise within the Square and horses in the Square, and so on and so forth. The people were watching.

Mr. Metzger: Would you say, more or less than a thousand?

[fol. 268] The Witness: Less.

Q. All right. Let me ask you this question: You testified that just prior to the beginning of the speeches, that certain individuals in your organization were wearing black arm bands and formed a sort of semicircle within which all of the demonstrators were located. That you observed this; is that correct, or do you recall? Do you recall correctly what you said?

A. This was the plan. Since I could not see the back perimeter on the Square, I assume there was a semicircle which was controlled by our people.

Q. You could not see the back perimeter?

A. Not completely.

Q. That means you could not see what was going on on the street?

A. I could see on the streets on either side of me, yes.

Q. I see. Where is it that you couldn't see?

A. Well, I couldn't see, let's say, to the end of the Square, where the other statue is, the statue of George Cohen, I think. Anyway, there is a statue at the end of the Square. [fol. 269] Q. You mean your semicircle went from the Square, where the Father Duffy Statue is all the way down, past the shrubbery, to the tip of the Square, at 46th Street?

A. No, I testified earlier that our people were within the perimeter bound by the street lines. I stated I could not see that far. I could not see to the end of the Square.

Q. That is not really being responsive. Could you see to the traffic lights? You said when you originally testified that this was the extent, the traffic lights, the southernmost extent of the group.

A. To the best of my knowledge.

Q. Could you see to that periphery?

A. Yes, sir.

Q. And could you see that the people with the arm bands were posted in a semicircle covering that area?

A. The people were gathered in a semicircle, but I assume the people with the arm bands were—

Q. You didn't see. You assume.

A. I saw the people with the arm bands on the perimeter near to me. I could not see the people with the arm bands [fol. 270] to the rear.

Q. Your answer then was that you could not see to the end of Duffy Square. I know you could not see to 38th Street either. But how far could you see, to where the arm bands people were?

A. Yes, I did.

Q. So you did see the entire perimeter of the people with the arm bands.

Miss Johnson: I object, the witness stated he did not see the south end of the Square. I don't see why the District Attorney continues to ask that.

The Court: Objection sustained.

Q. Do you want to indicate again on People's Exhibit 1 the south end of where the people were that you are talking about?

A. As far as I can recall, they were in a semicircle, back of these lampposts.

Q. Were you able to see in back of that semicircle?

A. I was able to see space in back.

Miss Dembitz: May I see where the witness indicated, and would it show on the record where the witness indi- [fol. 271] cated.

Mr. Metzger: It would indicate a semicircle running from one lamppost to the other.

Miss Dembitz: Are you speaking of these two lampposts that are showing on the picture, on the east and west of Duffy Square, at about the middle of the subway grating, or parallel to the middle of the subway grating?

Mr. Metzger: Right.

Q. Now, what happened after—withdrawn. Did you see Mr. Kunis—do you know who he is, by the way?

A. Yes, I do.

Q. Did you see him there? Did you see him at Duffy Square on the day in question?

A. I don't recall.

Q. Did you ever see him lie down on the street?

A. No, sir.

Miss Johnson: Objection. He testified he did not see him that day.

Mr. Metzger: He said that he could not recall.

[fol. 272] The Court: Objection overruled.

Q. Did you see him lie down on the street?

A. No, sir.

Q. Did you see Mr. Eckhardt—do you know who he is, by the way?

A. Yes, sir.

Q. Did you see him there on the day in question?

A. Yes, sir.

Q. And did you see whether or not the lay down in the middle of Broadway?

A. No, sir.

Q. No, sir, what? You did not see him?

A. I did not see him.

Q. I see. Did you see Ann Kyllingstad?

A. Yes, sir.

Q. Do you know who she is?

A. Yes, sir.

Q. She was there at Duffy Square?

A. Yes, sir.

Q. Did you ever see her slap a police officer?

A. No, sir.

Miss Dembitz: I object. I ask this be stricken. There [fol. 273] has been no testimony, to the best of my recollection, to this effect.

Mr. Metzger: Then your recollection, I am afraid, is wrong.

The Court: Objection overruled.

Q. Did you see Mr. Rhoads at the demonstration?

A. Yes, sir.

Q. Did you see him attempt to—withdrawn. Did you see him in the proximity of the police officer who was arresting Mr. Kunis?

A. No, sir.

Q. Did you ever hear him scream?

A. No, sir.

Q. Did you hear anybody scream?

A. Yes.

Q. Who screamed?

A. Many of the people screamed when the police came.

Q. I didn't ask you that, did I?

A. I don't know. Did you?

Q. Are you listening to my questions?

[fol. 274] A. You said did I hear people scream, and I said, "Yes, I did hear people scream."

Q. That's right. Did you see defendant Teahan at the scene?

A. No, sir.

Q. You didn't see him there?

A. No, sir.

Q. So you don't know—withdrawn. How about the defendant Maher, you saw him there, didn't you?

A. Yes.

Q. Did you ever see the defendant Maher strike a horse?

A. No.

Q. You never saw—did you ever see the defendant Maher with anything in his hands, holding anything, have physical contact with a horse? Touch anything to a horse?

A. I don't recall.

Q. You don't recall? All right. Now, you testified Mr. Luce, I believe, as to something to this effect, as to what the captain said to your group at the time that he first approached, something to this effect: "This is an illegal [fol. 275] meeting and must be stopped. You have no right to hold a meeting here." Is that pretty much in substance what you testified to?

A. To the best of my recollection, that is the substance.

Q. Do you recall, Mr. Luce, the captain or the inspector saying anything that the meeting was interfering with pedestrians and vehicular traffic; and that for that reason the meeting had to be terminated? Do you recall anything to that effect?

A. No, sir.

Q. Simply that it was an illegal meeting and nothing more?

A. Yes.

Q. Did you see traffic veering either to the right on Broadway or to the left on Seventh Avenue, in the vicinity of Duffy Square during this period of time; and by "veering" I mean going away from the Square, out of a straight line of traffic?

Miss Dembitz: I object, unless the District Attorney states what he means by "this period of time."

[fol. 276] Q. From 4 o'clock to 4:15 p.m. on the day in question.

A. Yes.

Q. What was out on the street at that time?

A. Horses.

Q. I see, the traffic was veering away from the horses?

A. Yes, sir.

Q. Did you see any people with placards on the street?

A. Yes.

Q. And were these just standing there?

A. No, the horses chased them into the street.

Q. I see, I see. I don't think that was responsive to my question, and I am going to ask that it be stricken.

The Court: I'll let it stand.

Q. Did you see horses turning sideways and moving sideways? And do you know what I mean by that? With the length of the animal going along the sidewalk pushing people back into the Square? Did you ever see that?

[fol. 277] A. (No response.)

Q. Withdrawn. You testified before that you saw horses and they came charging into the group; is that right?

A. Yes, sir.

Q. This is head on? That is the meaning you mean to convey?

A. Yes.

Q. Just straight on onto the people?

A. Yes.

Q. I see. Were there any riders yelling, saying anything, or waving their hands in any way?

A. Yes.

Q. I see, and did you ever see the horses moving sideways?

A. Yes.

Q. Now, you distinguish that from a charge, don't you?

A. Yes.

Q. Did you ever see Mr. Maher near a horse?

A. Yes.

Q. Did you see that horse rear up?

[fol. 278] A. No, sir.

Q. No? Are you a member of the Communist Party of the United States.

Miss Dembitz: I object, completely irrelevant to the issues of this case, and prejudicial.

Mr. Metzger: Your Honor, he is a witness.

Miss Dembitz: This is a question of occurrences at a meeting on Duffy Square on August 8th. What Mr. Luce's connections, if any, with any political party or any other kind of party organization has no relevance in this case whatsoever.

The Court: Objection sustained.

Mr. Metzger: Your Honor, may I—withdrawn. I have no further questions of Mr. Luce at this time.

Miss Dembitz: There are a few redirect questions I would like to ask Mr. Luce, but with Your Honor's permission, the reporter from the New York Times that we have had in and out of the courtroom now for two days is [fol. 279] here, and he is urgently needed back on his job. With your permission I would like to call him, and then recall Mr. Luce for a short time.

The Court: You may do that.

Miss Dembitz: I will get him.

Bridge Officer: I will get him.

JOSEPH LELIVELD, was called as a witness, and after having first been duly sworn by the Court, testified as follows:

Bridge Officer: Name, address, and occupation.

The Witness: Joseph Leliveld, 509 West 110th Street. I am a reporter for the New York Times.

The Court: How do you spell that?

The Witness: L-e-l-i-v-e-l-d.

Mr. Metzger: I can't hear.

The Witness: L-e-l-i-v-e-l-d.

Direct examination.

By Miss Dembitz:

Q. Mr. Leliveld, will you briefly state your educational [fol. 280] background?

A. I am a graduate of Harvard College, and I have a Masters Degree from Harvard and Columbia, and I am a reporter with the New York Times.

Q. And how long have you been a reporter for the New York Times?

A. I have been a reporter for the Times since, I guess, a year and a half. I have worked for the Times in other capacities for about three years.

Q. And are you here—strike that, please. Were you directed by your newspaper to cover the meeting held at Duffy Square on August 8?

A. That is right.

Mr. Metzger: Objection as to what he was directed to do. I don't see the materiality. If he was there; he was there.

The Court: Objection sustained. Strike out the answer.

Q. Were you at Duffy Square on August 8? Were you there at the time of the meeting with which this case is concerned in your capacity as a newspaper reporter?

A. Yes.

[fol. 281] Q. Did you thereafter write a report in the New York Times about the occurrence, as a witness?

Mr. Metzger: I object to this as not being material, what he did thereafter.

The Court: Objection sustained.

Q. Was your name carried in a byline in the New York Times together with the report?

Mr. Metzger: Objection.

The Court: Objection sustained.

Q. Were you subpoenaed by me to appear in this proceeding?

A. That's right.

Q. Are you acquainted with any of the defendants in this case, other than as a reporter for the New York Times?

A. No.

Q. Have you had any association or contact with any of the defendants in this case at any time other than as a reporter for the New York Times?

A. None.

Q. Now, Mr. Leliveld, addressing ourselves to August 8, at approximately—what time did you arrive at Duffy [fol. 282] Square?

A. Shortly before 4 o'clock.

Q. And will you please describe what you saw when you arrived there?

A. All I can recall seeing was a television car belonging to one of the television or radio networks. I don't recall which, and a few press people. None of the demonstrators had arrived at yet; or if they had they did not have their signs out. It was an ordinary Duffy Square scene on a Saturday afternoon.

Q. And what happened next?

A. Well, I don't remember the times sequence. I remember the meeting was supposed to begin at 4.

Mr. Metzger: I am sorry. I have to object and ask that particular piece of testimony be stricken, as to what was supposed to have happened.

The Court: Strike it out.

A. (cont'd) I don't remember the time sequence, but perhaps 15 minutes or a half hour, perhaps, after we got there, a group of people with signs arrived and started forming themselves in, more or less, ranks; and signs were [fol. 283] distributed to people who didn't have them; and there were a number who had leaflets of one sort or another, who circulated through the people in the Square, giving them to each other and attempting to give them to ordinary people who were not with their group.

Q. And what happened next?

A. Then they formed in front of the monument of Father Duffy and—I don't recall the sequence of speakers. I believe Mr. Laub spoke first introducing somebody else.

Q. Where was Mr. Laub standing?

A. On the steps.

Q. Where was the assembly of people gathered?

A. Directly in front of him. It formed a kind of a triangle there, or a triangle-like shape.

Q. Well, showing you People's Exhibit 1, which is a picture of Duffy Square, will you please indicate where the assembly of people were standing?

A. I don't think there was anyone further back than this grating. The speakers were here, and they were ranked.

[fol. 284] Mr. Metzger: Indicating the south end of the grating, through and including the steps.

The Witness: I would say that the speakers were on the steps. I was standing here, and a couple of press people were here, but I think most of the crowd were between the flagpole, and as far as the grating is as far as they went.

Q. Did the people completely cover the grating, to your recollection?

A. I don't recall that. I don't think I was conscious of the existence of the grating at the time.

Q. Did you observe whether any of the people who were listening to the speeches were in the street, as distinguished from the Square?

Mr. Metzger: I have to object to that as not being properly formed.

The Court: Objection sustained.

Q. Did you observe where the people who were listening to the speeches were standing?

Mr. Metzger: Same objection.

The Court: Objection to that is overruled.

[fol. 285] A. Yes. I thought they were standing, generally, in the area I indicated, in the photograph.

Miss Dembitz: Indicating the grating.

The Witness: Yes, more or less spilling over, perhaps, on one side, or not covering it completely.

Q. By that you mean spilling over the grating?

A. Yes.

Q. Now—

A. They were rather closely packed, as I recall it; and there weren't more than 60 people.

Q. What is your estimate?

A. I don't think there were more than 60 people among those listening to the—you know, who had formed to listen to the talks.

Q. Mr. Leliveld, you were standing on the steps during the speeches; is that correct?

A. Yes. Well, not on the steps, in front of it, close to the speakers.

Q. And you observed the crowd that assembled in front of the steps?

[fol. 286] A. Yes.

Q. Is that correct?

A. Yes.

Q. What did you observe the crowd doing?

A. Just standing there and—this was a very brief period that we are talking about now, but they would applaud at the end of the talks; or when a particularly strong or striking statement was made, they would cheer; but they were not moving around very much, as I recall it.

Q. Did you hear any screaming, shouting, yelling, shrieking?

A. At that point?

Q. At that point, from the group that was assembled.

A. No, I would say ordinary cheering. I would not say—you know it was not particularly restrained, but I would not say it was a ruckus, or shrill, or anything like that.

Q. What was the next happening after the few minutes of speeches that you just described?

A. As I said, I don't recall the sequence of speakers, but very early in this meeting a police captain stepped [fol. 287] up.

Q. Do you know the name of the police captain?

A. Well, I didn't know it at the time. I found out very quickly: Captain McCallister. And he asked them who had given them permission to hold the meeting there in Duffy Square. And I think his first words were, "Hold this up. Who is giving you permission?" Something to this effect.

The Court: Did he ask them, any of these people, if they had a permit to hold a meeting?

The Witness: He said, "Who gave you permission?" I don't think he referred to a permit as such.

The Court: You mean that is your best recollection as to what was said?

The Witness: Well, I took notes, and that is pretty close to being verbatim, I think.

Q. Mr. Leliveld, your recollection is that Captain McCallister's statement was, "Who gave you permission to have this meeting here"?

[fol. 288] A. Something like that, "Who gave you permission?" I wouldn't say, "quote," but I think the word was *permission* rather than *permit,* if that means anything.

The Court: And in answer to that, what if anything did any of these people who were addressing the crowd say?

The Witness: It was my recollection they did not answer him directly. I may be wrong on this now. I may have the

sequence out of order. But they sort of answered him through the bullhorn they were employing, and said something to the effect that they didn't need permission to hold a constitutionally privileged assembly, or something like that.

The Court: And this was over the bullhorn?

The Witness: That is my recollection, but I wouldn't be sure that that was their first response to him.

The Court: But I am asking you the substance of it, whether it was over the bullhorn.

The Witness: The question was asked several times. I [fol. 289] don't know if it was done the first time, but they did that eventually.

The Court: Who answered the police captain through the bullhorn?

The Witness: I believe it was Laub.

The Court: And when you talk about this bullhorn, does that soften the voice that goes through the megaphone part of it?

The Witness: No, it projects it.

The Court: It projects it in what way? In what way does it project it?

The Witness: I imagine like a microphone, perhaps not as sensitively.

The Court: Well, would you say it is a loud noise or voice that comes out of the open end of the bullhorn when the voice is projected into it?

The Witness: Sure.

Q. Mr. Leliveld, were you standing fairly near Captain McCallister and Mr. Laub?

A. I believe I was standing between them, or just about. It got pretty closely packed, but I believe I was trying to [fol. 290] take down their conversation. So, I was as close as I could be.

Q. Did you— Were Mr. Laub's statements of such a volume—you were standing next to him—that you felt a considerable disturbance, auditorily speaking? I withdraw that. I would admit it is not in very good form.

The Court: You were there as a reporter, were you not?
The Witness: That is right.
The Court: Is that correct?
The Witness: That is correct.
The Court: Were you there to write a story?
The Witness: That's right.

Q. Mr. Leliveld, when you say Mr. Laub used the bullhorn after Captain McCallister spoke to him, did Mr. Laub address the crowd through that bullhorn?

A. Well, I suppose you would say that is what he was doing in effect. The questions were formally directed to Captain McCallister, but Captain McCallister was standing right there. I think they were in effect meant for the [fol. 291] crowd.

Q. Did you thereafter have any conversation with Captain McCallister?

A. Yes.

Q. What was that conversation.

Mr. Metzger: Now, I am certainly going to object to that, Your Honor.

The Court: Objection sustained.

Miss Dembitz: May I ask the basis for the objection? This is a conversation which this witness had, which he is reporting. What is the objection? May I ask?

Mr. Metzger: The objection is that this is a classic example, in every textbook, of hearsay.

The Court: Objection sustained.

Q. Now, Mr. Leliveld, will you continue your description of the events after Captain McCallister stated that—or asked whether there was permission to hold this meeting and Mr. Laub made a statement over the bullhorn? Will you please continue your description of the events after that?

[fol. 292] A. Well there was some sparring back and forth between them, and then Captain McCallister withdrew from the steps. And I believe another of the speakers was intro-

duced, and the meeting seemed to be resuming. It almost for a moment, for a brief moment, seemed that Captain McCallister had decided that he wasn't going to do anything. But he returned after several moments, and asked for permission to use the bullhorn, I believe. I don't recall. I am a little vague.

Q. What did you observe?

Mr. Metzger: He's testifying.

A. I am a little vague about this. He said he wanted to make a statement to the group, and I don't recall how he got to make it; but he did make it, to the effect that if they didn't disperse themselves within a given period of time—and I don't remember what it was, but it was brief—they would be subject to arrest for disorderly conduct.

Q. And what happened after that?

A. Well, at that point things got a little out of hand, because a number of people seemed to start making speeches.

[fol. 293] Everyone on the steps started denouncing—

The Court: Tell us what was said.

The Witness: Okay. It is hard to, because it was very chaotic.

The Court: You see, you are giving us the operation of what impressed you.

The Witness: Yes.

The Court: But what we are interested in is, when Captain McCallister told the crowd to disperse or they would be put under arrest, what was said then by the people who were conducting this meeting.

The Witness: Well, about six people started saying, simultaneously—and since it was simultaneously it was hard to get a coherent drift—that this was unconstitutional; that it was their right to stand there and conduct a meeting; that they would continue to do so, whatever the police said; that this was an example of the way a Police State operates; that this was facism; that this was Mississippi, and so forth.

Q. Did you then see additional policemen arrive?

[fol. 294] Mr. Metzger: Objection, as leading.

The Court: Objection sustained. What happened after that?

The Witness: After that, when Captain McCallister's warnings were not heeded, about a dozen policemen moved into the area and started dispersing the group, using their nightsticks to move them back; and two mounted policemen came from the Seventh Avenue side and rode into the group and rode their horses around in sort of a little dancing circle.

A number—I would say, the majority of the group actually moved out of the area; and, on the other hand, a number of people, I would estimate 20, but it would be hard to be sure, tried to hold their ground; and of those who tried to hold their ground the police, starting to arrest them, put them into prowl cars, or hailed taxicabs on Seventh Avenue and on Broadway and put them in with a policeman or took them off.

Q. Mr. Leliveld, would you say that these horses were in effect—I believe your term was "dancing around." In what [fol. 295] area of this Square were the horses doing this activity?

A. Right where the crowd had been standing. They came in to where, I would say, where this bus is; and they were around here, around in here.

Miss Dembitz: Indicating the grating.

A. Around the grating, yes.

Q. What did you do when the horses came upon the grating?

A. Well, I moved around and tried to observe as much as I could. My job at that point was to observe what was going on. So, I stayed in the area and kept moving. I stayed out of the way of the horses, for sure.

Q. Were you frightened of the horses?

Mr. Metzger: Objection.

The Court: Objection sustained.

A. No.

Q. Did you move off the area in which the horses were?

A. Well, there was a great deal of activity of all different sorts, because a number of people were running [fol. 296] around, and the police were attempting to arrest those who were not dispersing. And I tried to observe as many of these separate events as I could. So, I was running around a good deal. I was on the street sometimes. I was on the grating sometimes. I was trying to see as much as I could and take notes on it, because that was my function there.

The Court: Were any of these people that were listening to the speeches making speeches after they were told to disperse? Were there any of the people who actually heeded the direction of the police captain to disperse and did disperse—were any of those people arrested?

The Witness: I couldn't see and make a categorical statement that none of them were arrested, but the police were certainly concentrating on the area where the crowd was standing. So, I would say that was the case; but I would not be sure.

The Court: Was it, or was it not your observation that the people that were placed under arrest within your view [fol. 297] were the people that failed to heed the order of the police captain?

The Witness: Yes, that's true.

Q. Mr. Leliveld, you testified that the policemen were attempting to disperse the crowd. Did you observe whether or not they had anything in their hands?

A. Well, they had their billy clubs.

Q. Did you observe whether anyone in the group they were attempting to disperse had anything in their hands, other than placards?

A. I don't recall anything other than placards; perhaps some people were carrying books. I am sure some of the girls had pocketbooks.

Q. Did you observe rocks, bottles, or any other type of implement?

A. No.

Q. Now, while you were standing on or near the steps during this period or prior to the time you testified prowl cars and taxis were in the area for the purpose of putting arrested persons into them, did you observe any interruption of traffic?

A. I am not sure of the time. You mean now— Do you [fol. 298] mean before the policemen moved into the area to disperse the group?

Q. Yes, that is the time I am referring to, before the police moved into the area to disperse the group.

A. No. You know, I can't be sure that there was none; but I did not observe any.

Q. Your office, Mr. Leliveld, is in this area of the City, approximately?

A. Yes.

Q. So you are fairly familiar with this area of the City?

A. Yes.

Q. Would you say that the number of people on Seventh Avenue and on Broadway at the time of these occurrences was the approximately normal number of people for this time of day and for this afternoon?

A. Well, I would say it was the normal number of people for a Saturday afternoon this summer, which was somewhat larger than on other summers because of the number of tourists in the area, and so forth, the number of tourists that came because of the World's Fair; in other words, Times Square on week ends was more crowded this sum- [fol. 299] mer than it usually is.

Q. But as far as this particular Saturday afternoon is concerned, would you say the conditions were the usual conditions for a Saturday afternoon of this summer?

A. That's right.

Q. Now, when you went up to Duffy Square, did you go there for the purpose of reporting on the meeting?

Mr. Metzger: Objection.

The Court: Objection is sustained. He testified already he was there—

Miss Dembitz: I wish to ask him one further question about his purpose in going to Duffy Square.

The Court: He is there, and he is a reporter; is that correct?

The Witness: That is correct, sir.

Q. Mr. Leliveld, how did you know there was to be a meeting at Duffy Square on August 8?

Mr. Metzger: Don't answer. That is objected to.

The Court: If she wants him to answer it, I will per-
[fol. 300] mit it; and the objection is overruled.

A. The metropolitan desk of my newspaper received a standard announcement that there would be a meeting. I don't recall the form of it, but I believe it was a mimeographed sheet; that there would be a meeting protesting the war in Viet Nam at Duffy Square at 4 o'clock held by—I believe the name given was the May 2nd Committee.

The Court: You didn't solicit that announcement, did you?

The Witness: No. It was one of hundreds such announcements that come into our newspaper every day.

The Court: Now, do you want to still persist in your objection?

Mr. Metzger: No, I do not persist, Your Honor.

Miss Dembitz: That's all.

Cross examination.

By Mr. Metzger:

Q. All right, Mr. Leliveld, just a few questions and I
[fol. 301] will let you get back to the Times. Now, when you were testifying you said that, eventually, when the horses came into the area, they were dancing around in little circles, moving their sides into the crowd; is that how you mean to say?

A. Yes, I guess that is the intention.

Q. Did you ever see a horse charge directly into a crowd of people, head on?

A. Have I ever seen it?

Q. No, at this time and place.

A. Well, it is a hard distinction to draw, because the area is so small.

Q. Let me perhaps reframe the question now. If the horse is moving his side, and he is merely, more or less, keeping his front legs in the same place and pivoting about his front legs, more or less dancing a little bit, that is one way; and the other way, of course, is what is described as a straight head on charge.

A. Just a slaughter-type thing.

Q. That sort of thing.

A. No, they rode in straight. They didn't ride in danc-
[fol. 302] ing, but when they got there they turned in small circles; which if they were going to stay in the area that is all they could do, because it is so small.

Q. All right. Did you hear the entire conversation betwene Captain McCallister and the leaders of the group at the time that you have testified to?

A. I believe I did. I don't know if I can recall it.

Q. You are not sure that you heard the entire conversation?

A. Well, at the point when Captain McCallister first came up?

Q. Let's say both times; first let's say the first time.

A. The first time I am quite sure that I did. The second time, like I said, things got a little confused and I couldn't be sure of any particular thing that happened at that point.

Q. Didn't Captain McCallister inform the group at that time, the second time, that vehicular and pedestrian traffic was being blocked by this demonstration?

A. No, I heard Captain McCallister say nothing, all
[fol. 303] afternoon, about traffic.

Q. All right. By the way, how was the condition for pedestrian and vehicular traffic?

A. At what point?

Q. After the second.

A. You mean when the meeting was being dispersed?

Q. Yes.

A. Oh, then it was—I imagine traffic was pretty well stopped, because prowl cars were converging on the park and all empty taxicabs were being stopped.

Q. Now, the people that would be chased off the area, did you see any of them come back and re-group behind the police?

A. I believe there was some of that. The people would sort of move out of the area when the horses danced towards them, and go around the monument.

Q. And come back again?

A. Yes, that is correct. I believe so.

Q. Do you recall seeing anyone hit a police officer?

A. Yes.

Q. Who was that?

A. It was a girl.

[fol. 304] Q. Do you see her in court today?

A. I don't think I could recognize her.

Q. Let me show you a picture and ask you whether you recognize the persons in the picture. This is People's Exhibit 7.

A. Yes, I saw that. I believe I was standing over here, at that point.

Q. Did you see the officer strike the woman?

A. No, I think he was using the club the way it is indicated there, just—

Q. Warding off?

A. Warding off. He was holding her pretty tight, but she was obviously the one who was doing the hitting. In other words, he was pushing back a cluster of people; and she was retaliating by going at him with her fists.

Q. Did you see anyone lie down on the streets?

A. There was one boy in a green T-shirt which went sort of stiff and was more or less loaded into a police car.

Q. Stiffly?

A. Yes, he held himself stiff.

[fol. 305] Q. Did you see him lie on the street?

A. I am not sure if it was on the street or the sidewalk. I couldn't be sure of that. I remember him being lifted, and I remember the act of loading him into the car. It was like loading a piece of lumber into a truck, but I don't recall where they picked him up.

Q. From your observations, you would say no more—and I believe those were your words—no more than 60 people involved in the demonstration?

A. Involved in the demonstration.

Q. How many people would you say were watching from the other side of each street?

A. Now, before the disorders began, I would say they were not succeeding in attracting very much attention at all; perhaps a number of people walked by out of curiosity, to see what it was about, and saw what it was about and left. Some may have stayed, but I don't think there were many onlookers as there were demonstrators.

After the disorders began I was concentrating on them and not on the crowd. I remember looking and seeing [fol. 306] there were crowds under the movie theater marquee, on both sides of the street, just sort of standing and looking out as if there was a parade or something.

Q. Now, directing your attention to the period of time before the Captain made his first approach to the group, did you see anyone in the street at all, any of the group in the street?

A. Pardon me?

Q. Did you see any of the group in the street?

A. No. I don't mean that I didn't see anyone step off the curb; but I don't recall any of them being on the street as such.

Q. Were you able to have this whole area within your observation during this period of time?

A. No.

Q. I see.

The Court: Now, you are talking about a picture there, and you referred to it. You said that you recognized the lady on that picture; is that correct?

The Witness: Yes, I saw that particular scene. I was [fol. 307] very close to that when that happened.

The Court: So we'll have it for the record, what exhibit is this?

Mr. Metzger: I identified it already, Your Honor, as being People's Exhibit 7.

The Court: Can you identify the person whose picture that is?

Mr. Metzger: Earlier this had been identified on the record by one or more officers as being Ann Kyllingstand, the defendant Ann Kyllingstad.

Q. Did you see anyone with a drum at this demonstration?

A. (no response)

Q. A large drum?

A. That rings a bell, but I am not sure.

Q. Did you see anyone wearing masks?

A. Masks?

Q. Yes, sir, masks.

A. There was one group that was carrying kind of effigies. I do not remember whether they themselves were [fol. 308] decorated or not. But they wore sort of, I suppose, a prison camp color grey, and they wore sort of Plaster of Paris things; but I am not sure what they were; and I am not sure whether they were wearing masks.

Mr. Metzger: I don't have any further questions.

The Court: You told us certain statements that were made by this group, the group on the speakers' side of it, after the Captain told them to disperse or they would be placed under arrest.

The Witness: Yes, sir.

The Court: Then you testified as to what was said.

The Witness: That's right.

The Court: Were the answers made in a low voice, medium voices, or loud voices? Were the bullhorns used?

The Witness: I believe there was only one bullhorn used. I don't remember if it was used at that time, but [fol. 309] there were a lot of people that were just plain shouting.

The Court: And what were they shouting?

The Witness: Things like, "fascist cops. Democracy is dead." Those are some of the ones I recall.

Mr. Metzger: May I ask you one question?

The Witness: Just one?

Q. Between the time—and isn't it a fact—between the time that the Captain finished his conversation, such as might have been the second time, and the time the first police officers even came on Duffy Square—that the crowd had broken into general disorder, screaming, yelling, going into the streets and unto the sidewalks, after having heard this so-called order from the Captain? That was almost instantaneous?

A. Yes, that is correct. This was such a brief period of time that you are talking about, that I don't think we are speaking about 30 seconds even; but I don't think there was a great deal of movement at that point. I don't believe there was time, but I think there was a lot of [fol. 310] noise.

Q. Try to confine yourself to, actually, what you saw.

A. That is what I am trying. You asked me if I saw them going on the streets. No, I didn't. My recollection is having seen a lot of people start shouting, as I described, various slogans and so forth; but I don't recall a great deal of movement.

I think the movement started when the police moved in to arrest.

The Court: I thought you testified that when Captain McCallister told them they had to disperse or otherwise

they would be arrested—I thought that you testified that a good many, a good number of people did disperse; and that a group of about 20 remained and refused to disperse.

The Witness: No. I think—I want to be clear. We are talking—this happened very quickly. So, I wouldn't want to be too concrete about sequence; but it is a very brief period of time, and it is my recollection that they dis-
[fol. 311] persed. Those that dispersed didn't start dispersing until the policemen moved in with their clubs and with the horses. I don't think that any of the demonstrators left the area simply because Captain McCallister —I would not say "any," but I don't recall seeing any demonstrators leave the area when Captain McCallister ordered them to.

On the other hand, when his men came into the area, I think the majority of them did in fact leave.

The Court: Where did they go?

The Witness: The other end of the Park, both ends of the Park, I would imagine.

Q. Just one last thing. Will you put your hands in the position that you put them when you originally testified as to the officers holding the nightsticks. Do you recall what position you had your hands in?

A. Yes.

Q. Will you do it again?

A. I was testifying about one officer.

Q. I am not talking about the Kyllingstand one, your original testimony that the officers—

A. They generally held it this way.

[fol. 312] Mr. Metzger: Indicating holding it across their chests, arms raised about mid-chest high.

The Court: To push people back?

The Witness: Yes, but I wouldn't want to leave the impression that was the only way I saw them using the nightsticks.

Mr. Metzger: Well, I have no further questions.

Miss Dembitz: I just have one or two questions, Your Honor.

[fol. 315] Redirect examination.

By Miss Dembitz:

Q. Mr. Leliveld, addressing yourself to the question of the police officers and their carrying of nightsticks, and [fol. 316] addressing yourself to the answer that you made to the District Attorney, that you observed them with their nightsticks in this position. (indicating) Did you observe them at any other time during this demonstration with their nightsticks in any other position?

A. I did.

Q. And in what position did you observe them?

A. I observed some police officers holding their nightsticks by the end, by the handle; and using, instead of the length of the stick, the end.

Q. Mr. Leliveld, just one further question to clarify something in your testimony. You were asked whether you—you were asked about vehicular conditions, and you testified with respect to taxis, prowl cars, and other vehicles being pulled up; and in connection with that you said—you referred to before and after the disorders occurred. When you used the term, "disorders," were you referring to the activity that occurred after the order of Captain McCallister to disperse?

A. Yes, after the police began in fact dispersing and met resistance.

Q. Yes. No further questions.

[fol. 317] Mr. Metzger: Thank you.

The Court: You may step down. I believe Miss Dembitz said she wanted Mr. Luce for some redirect.

Miss Dembitz: Yes, Your Honor.

(Philip Luce was recalled to the stand)

Redirect examination.

By Miss Dembitz:

Q. Mr. Luce, in answer to a question on cross-examination, you testified that you heard some—pardon me. I withdraw that. I would like to go back to where we were on the examination of this witness.

On cross-examination you were asked whether after the order was given to disperse the crowd you heard any screaming. Do you recall? And your answer was, "Yes."

I want to ask you whether you recall any of the defendants screaming at that time, or to what—where you heard the screaming that you referred to.

A. After the order to disperse? Is that correct?

The Court: Yes.

Q. Yes.

[fol. 318] A. Yes, I did hear screaming. There were two specific instances that I recall. After the police captain ordered the demonstration to cease, many of the people in the crowd began to yell, "let them speak," and it was a very clear and audible chant which was set on among the group. They were saying, "Let them speak," as McCallister was standing there, and the chant and all this happened, again, within a minuscule time range, perhaps 30 seconds.

McCallister spoke. Mr. Laub spoke. I think McCallister again spoke, at which point the people began to chant, "Let them speak." The horses then came, and the policemen came. This was all happening at the same moment.

Q. Now, one question with regard to this meeting, Mr. Luce. We have already covered the fact in your direct testimony that you participated in the organization and planning of this meeting.

A. Yes.

Q. Was this meeting announced through handbills, or circulars, and other announcements, posters, or other type of announcements?

[fol. 319] A. Yes, we printed, I believe, 10,000 leaflets, which were distributed around the city. We held meetings on college campuses around the city prior to Saturday the 8th.

Q. So that is the truth, Mr. Luce. And do you know from your own knowledge and from recognizing some of them that the people who were assembled on the grating to hear the speeches came in response to announcements of the meeting?

Mr. Metzger: Come on. You can't ask that. That is objected to.

The Court: Objection sustained.

Miss Dembitz: All right, that's all.

Miss Johnson: I would like to call the defendant Albert Maher.

Bridge Officer: Step over here. Stand up here and raise your right hand. Face the Judge.

Albert Maher was called as a witness on behalf of the defendants, and after having first been duly sworn by the Court, testified as follows:

[fol. 320] Bridge Officer: Be seated. Name, address, and occupation.

The Witness: My name is Albert Maher. I live at 374 Beacon Street, Cambridge, Mass., and my occupation is student.

Miss Johnson: Can you speak louder.

Direct examination.

By Miss Johnson:

Q. You say you are a student. Are you a student?
A. I am registered as a student.
Q. I can't hear you.
A. I am registered as a student at Harvard University.

Q. And the address you gave, is that a temporary address or permanent address?

A. That is my permanent address.

Q. Were you present on Duffy Square on the afternoon of Saturday, August 8, of this year?

A. Yes, I was.

Q. And you were there for what purpose, Mr. Maher?

Mr. Metzger: That is objected to, Your Honor.

[fol. 321] The Court: I will permit it.

Q. For what purpose were you at Duffy Square on that day?

A. I was there to speak at a meeting protesting the war in Southeast Asia.

Mr. Metzger: Will Your Honor direct the witness to raise his voice. We know he can talk louder.

A. I was at Duffy Square to participate and speak at a meeting to protest the war being carried on now by the United States in Southeast Asia.

Q. I show you a picture which has been introduced into evidence as People's Exhibit Number 4, and ask you whether you can identify any of the people in the photograph.

A. Yes, I can identify myself, if you like.

Q. Yes. Can you identify anybody else, other than yourself?

Mr. Metzger: He is indicating a man in a black suit with a tie. His face is away from the camera. He has a placard in his right hand. Is that the one that was iden-

[fol. 322] tified, counsel?

Miss Johnson: Yes, that's right.

Q. That is a picture of you?

A. Yes, that is correct.

Q. Mr. Maher, there has been testimony by police officers, Annitto, and others, that you hit a horse with a rolled up placard; is that correct?

A. Yes, that is correct.

Q. Will you please tell the Court the circumstances of your hitting the horse?

A. Well, as the meeting began, I was standing fairly close to the front of the crowd, on the east side of the crowd. This is the side that at least one horse came from, because shortly after Captain McCallister left, or disappeared after the last conversation, the horses came out from behind the statue and were coming straight into the crowd. All of us who were in this part of the crowd started moving backwards, but as happens in a case like that, when you are walking backwards, the fellow standing next to me fell down; and I used a placard across the face of the horse in order to stop him.

[fol. 323] Mr. Metzger: I can't hear you.

The Court: I can't hear you either. What happened with reference to you and the placard and the horse?

The Witness: I am standing in front of the crowd, and the horse is coming straight into the crowd. Those of us who were standing towards the front started walking backwards, as did most of the crowd in the section, as far as we could; but the horse was faster than we were. Therefore, some people tripped; and one young man who was standing next to me, walking backwards alongside of me, fell down.

At that point I took the placard and hit the horse a few times, in order to try and stop him. Then another horse arrived on the scene. I don't know from what direction, because by then everything was getting very confused; and there was a guy lying on the ground, and this horse came over from the other direction; and I think I also hit that horse with the placard.

Q. What was your purpose in hitting the horse, Mr. [fol. 324] Maher?

A. Well, if you hit a horse with an object like a placard, which makes noise, it sometimes makes them shy away and stop.

Q. What was your purpose in getting the horse to shy away or stop?

A. If the horse shied away or stopped, it would not be able to step on the person who was on the ground.

Cross examination.

By Mr. Metzger:

Q. Mr. Maher, you seem to know a lot about horses.

A. Is that a question or a comment?

The Court: Strike out the comment.

Q. Do you know a lot about horses?

A. Is that a proper question?

Miss Johnson: That is a proper question.

The Court: That is for me to rule on.

Miss Johnson: If he wants to ask the defendant whether he knows a lot about horses, we will stipulate that the de-

[fol. 325] fendant knows a lot about horses.

The Court: You want to stipulate that?

Miss Dembitz: Yes, we will stipulate.

The Court: I will permit the question. You may answer.

A. Yes, I do know quite a bit about horses.

Q. Are you from Texas?

A. That's correct.

Q. Now, you testified, Mr. Maher—withdrawn.

The Court: Was this placard that you used to hit the horses—was that rolled up?

The Witness: Yes.

Q. What was that made of, by the way, cardboard?

A. Yes.

Q. With a stick in between it?

A. No, there was no stick.

Q. Just cardboard?

A. Yes.

[fol. 326] Q. Just poster paper?

A. Poster paper.

Q. Fine. Did you have the opportunity to roll that up while walking backwards?

A. That's right. It rolls very easily.

Q. Do you recall what the horse did, by the way, when you struck it? Did it shy away?

A. Well, once the horse stopped. That is when I hit the horse with my hand.

Q. That was what?

A. I hit the horse with my hand. I missed with the placard, and I caught it with my hand. So, the horse stopped.

Q. I see. Did you try to pull the officer off that horse?

A. No.

Q. Did you see anyone else do that?

A. No, I did not.

Miss Johnson: I object. There was no testimony in the People's case that this defendant ever attempted to pull the officer off the horse.

[fol. 327] The Court: Objection overruled.

Q. Where did this take place, where the fellow fell under the horse, Mr. Maher, if you recall. You may refresh your recollection by looking at People's Exhibit Number 1.

A. Yes.

Q. Will you put your finger on the spot, so to speak?

A. It was somewhere on the grating. We were extending here, on the front row. I was standing in front of this flagpole, on the east side, and the horse came on this side; and we all walked back, and the young man fell on the grating.

Mr. Metzger: I don't have any further questions.

The Court: Are you a member of the May 2nd Movement?

The Witness: Of the May 2nd Movement?

The Court: Yes.

The Witness: I am, as a matter of fact.

The Court: And there was testimony here that the group [fol. 328] with which you were connected were listening to certain speakers is that correct?

The Witness: Yes.

The Court: And about how many people would you say were in this group that were listening to the speakers? Would you estimate?

The Witness: I would estimate the size of the gathering, of the group, as 100 people. About 100 people.

The Court: Would you say that the people in that group are members of your movement?

The Witness: No, I would say, by large they were people who supported the position that the movement took on this war in Viet Nam.

The Court: And I take it—

Mr. Metzger: Your Honor, I am sorry to interrupt, but I can't hear the witness.

The Court: Will you try to keep up your voice.

[fol. 329] The Witness: I said, I don't believe that the majority of the people who had gathered there on Saturday were members of the May 2nd Movement. I think the majority were people who agreed with the position of the May 2nd Movement concerning the war in Southeast Asia.

The Court: There has been testimony here by Mr. Luce that approximately 10,000 leaflets were sent out advertising this meeting. Were you aware of that?

The Witness: Yes.

The Court: And I take it that the purpose of that was so that the speakers could talk to the people who were not members of the Movement, to enlist them to see your point of view?

The Witness: To have a meeting, yes; to present our ideas.

The Court: And I assume that was the reason that these bullhorns were used, so that the voices could be amplified [fol. 330] and projected, to attract people?

The Witness: Or, at least, to make our ideas intelligible to those who would like to listen, to the people.

The Court: But if there was only a group of 60 or 100 people you were interested in, it would not be necessary to use amplification, would it?

Miss Johnson: I object to the question.

The Court: I withdraw it. What was the purpose of using the bullhorns?

The Witness: To make the voices of the speakers more audible to those who would like to hear it.

The Court: To amplify it?

The Witness: Correct.

The Court: Any further questions?

Miss Johnson: No questions.

The Court: Thank you. You may step down.

[fol. 331] Miss Johnson: The Defense will call the Defendant Theodore Ostrow.

Theodore Ostrow was called as a witness on behalf of the Defendants, and after having first been duly sworn by the Court, testified as follows:

Bridge Officer: Be seated. Your name, address, and occupation.

The Witness: Theodore Ostrow, 446 West 55th Street, Manhattan. I work at the Underwood Corporation.

The Court: Keep your voice up, please.

Miss Johnson: Keep your voice up so that everyone can hear you.

The Witness: I work for the Underwood Corporation.

The Court: The what?

The Witness: The Underwood Corporation.

The Court: What is your position?

The Witness: I am an assistant supervisor.

[fol. 332] Direct examination.

By Miss Johnson:

Q. Mr. Ostrow, were you in the area of Duffy Square on Saturday, August 8, of this year?

A. Yes, I was.

Q. And what was your purpose in being at Duffy Square at that time?

A. I was there to attend a peaceful meeting, to listen to our speakers.

Q. I show you here a photograph which was introduced as People's Exhibit 8, and ask you if you can identify anybody in that photograph.

A. Yes, I see a picture of myself in this photograph.

Q. And I see in that photograph, Mr. Ostrow, you are wearing a black arm band.

A. That's right, on my left arm.

Q. Will you please explain the significance of the black arm band?

A. Yes. Shortly after arriving in the Duffy Square area, I recognized a friend, Miss Ellen Shallitt, who was carrying a brown manila envelope, which I later found [fol. 333] contained a number of black strips of material; one of which she gave to me. She said it was an arm band, and she asked me to put it on and to stand in the periphery—

Mr. Metzger: Your Honor, this is not really responsive to the question; and, if it is, I think the question is objectionable, in being too broad.

The question is, how did he come unto the arm band.

The Court: I will take it. The objection is overruled.

Q. Continue, please.

A. Miss Shallitt asked me to wear the arm band and to stand wearing the arm band in the periphery of the group, somewhere along the periphery of the group. She did not say "somewhere along the periphery of the group."

She did not. She also told me my purpose in wearing the arm band was to identify me as a monitor in the demonstration; and my duties would include making sure that the participats in the meeting would stay within the Duffy Square area and would not go unto the street; and if [fol. 334] any disorders I could handle did break out, I should try to subdue any ruckus or yelling, or what have you.

Q. I see. I show you another photograph, Mr. Ostrow, which is People's Exhibit Number 1; and it is an aerial view of Duffy Square. Will you please indicate, by pointing, where you were standing during the meeting, on this day?

A. Yes, I was on the—more to the west side of Duffy Square, near the flagpole, slightly behind the flagpole, and slightly to my right, as I face north of the flagpole.

Q. Were you standing inside the flagpole?

A. Yes, inside the flagpole, or to the right, to my right, or facing north, which would be the east side, with my back to the north, which would be the east side.

Q. Did you remain stationary at that point during the demonstration.

A. Well, yes, until such time as the police arrived in horses.

Q. While you were in that position, did you observe [fol. 335] persons in back of you?

A. I made a point of looking around in my general area, as this was my assignment, and there was no one; as I faced east, for example, there was no one behind me at any time during the early part of the demonstration. I was at the periphery, in other words.

Q. Were you at the periphery of the meeting, of the group?

A. Right.

Q. In your estimation, Mr. Ostrow, how many people had assembled for this meeting?

A. I would say, in that area, between 80 and 100 people.

Q. Just a moment, please; and did there come a time during this demonstration, or in the afternoon of this day, that you were arrested, Mr. Ostrow?

A. Yes, there was.

Q. And will you tell the Court what happened when you were placed under arrest?

A. All right. Shall I give the time also?

Q. What were you doing at the time you were placed under arrest?

[fol. 336] A. Should I also volunteer at the time the arrest occurred?

Q. Yes. What time did your arrest occur?

A. It occurred at about a quarter past four, I would estimate; or to place it in context to whatever has been said, after the police horses had been on the scene three or four minutes. The police were there disrupting the meeting.

The Court: Strike that out.

Miss Johnson: Strike out the word "disrupting."

A. I will change that to dispersing the meeting.

The Court: What?

The Witness: I could change that to dispersing the meeting.

The Court: I think that is the word you meant to use.

A. Well, I stood—I maintained my position in the Duffy Square area, but not always in my original position on the west side of the Square. I moved to avoid the horses, which were charging in about every direction. I then observed a group of officers—I am not sure whether it was [fol. 337] three or four—surrounding Miss—the defendant Miss Kyllingstad, and I saw her being taken half-dragged and half walking to a patrol car, I believe; but it may have been a taxicab which had stopped on Broadway on a line parallel with the flagpole.

I am a personal friend of Miss Kyllingstad.

Mr. Metzger: I am going to ask that that be stricken.

The Court: Oh, no, we'll let that in.

A. And I was aware of the fact that she had a young child.

The Court: That, there, is immaterial.
The Witness: Well, it isn't.

Q. Continue with your story.

The Court: That is for me to determine, not for you.
The Witness: All right.

A. Because of certain knowledge, personal knowledge about Mrs. Kyllingstad, that I was aware of at the time [fol. 338] I saw her being taken away, I went to the police officers who were at that time placing her in the patrol car. I was on the street at that time but—rather, near the curb. There was no other traffic flowing, by the way, on Broadway at that time. Traffic had been stopped, I believe, by the traffic officers who were at the corner of 47th Street and Broadway. No traffic was flowing at that time. I am sure. Well, I withdraw that.

I told the officer closest to me—and I will quote myself, "You cannot arrest her. She has a young baby." The officer, quoting him—the officer said, "We'll take care of that later." Unquote. And I was shoved either by this officer—I am not sure—either this officer or one of the other two, in the general area, shoved backwards towards the Square, towards Duffy Square Park, and into the group of at least two, perhaps three officers; and I was moving back, and I was held by them and shoved by them again almost into my original position. It was like an exchange from one group to another, and then into the center of the area again. At this point I heard a voice which I could not [fol. 339] identify, which said; and I quote, "You want him too."

Mr. Metzger: I am going to ask that that be stricken, Your Honor.

The Court: No, I will let it stand. Your objection is overruled.

A. At that point I was taken by the arm without a word being said. I was taken by the arm by an unidentified officer, uniformed, to a taxicab, which had by this time stopped in the middle of Broadway, at about the center and slightly south of my original position. When I had first approached the patrol car containing Miss Kyllingstad, seated in the rear seat of the taxicab, near the window, was the Defendant Rhoads; and, beside him, or in the middle of the seat, was officer Coffee. (Phonetic.)

Q. At that point, were you told you were under arrest?

A. No, I was not. I was told to get into the cab. I forgot to mention that during the disorder in the Square I had seen a group of perhaps three or four placards which had been discarded, which had just been dropped on the Square area. I picked them up, and I was holding them [fol. 340] under my arm to keep them out of the way. I was still holding these to the time I went to the taxicab. I was told to get into the taxicab; and either Officer Coffee or the other officer, told me to drop them; and I dropped them on Broadway, and I left them there.

Q. And then you were placed in the cab?

A. I was in the cab, and at this point I had not been told I was under arrest; but as we drove away I heard the officer give the order to the cabbie to take us to the—I believe it was the 16th Precinct; and I turned to the officer on my right; and I said, "Officer, am I under arrest?" and he said, "Yes, you are." I said, "Are you my arresting officer?" and he said, "Yes, I am." I asked him under what charge I was being held, and he said, "We'll decide when we get to the station house," or words to that effect.

Miss Johnson: I have no further questions.

Cross examination.

By Mr. Metzger:

Q. Mr. Ostrow, what do you do for a living?

[fol. 341] A. I work for the Underwood Corporation. I am an assistant supervisor.

Q. Is that the typewriter company, Underwood?

A. Yes.

Q. Are you married?

A. No, I am not.

Q. Do you live alone?

A. I am sorry?

Q. Do you live alone?

A. At the moment I am subletting an area of my apartment to the defendant Kyllingstad.

Q. I see. All right. Now, you said that you had some interest in defendant Kyllingstad at the time. Did you see when she hit the sergeant?

A. No, I did not.

Q. In other words, your interest—

A. Did I see when she hit the sergeant?

Q. Yes, did you see her hit the sergeant? You were here. You heard all the testimony. You even heard the newspaper man testify.

A. That is besides the point, really.

Q. You heard that?

[fol. 342] A. Yes.

Q. All right. Now, did you see her?

A. I didn't see Miss Kyllingstad hit anybody. No, sir.

Q. But you carefully observed all the rest of the facts with respect to Mrs. Kyllingstad?

A. No, I did not say that.

Q. How is it that you— What did you do to this officer? Or how did you conduct yourself in telling him that he couldn't arrest this lady because she had a baby?

A. I walked over to the officer, or one of the three officers that I saw. As I said, I spoke to the one closest to me; and I said in a normal tone of voice, "You cannot arrest her, because she has a baby."

Q. You said that in a normal tone of voice, at this point when she was being dragged, as you said, to the cab; and there were other prisoners in the cab; and the place was in complete disorder; and you said in a normal tone of voice, "You cannot arrest this woman, because she has a baby"? Is that your testimony?

A. That is my testimony.

[fol. 348] Q. Have you ever been convicted of a crime?

A. No, I have not.

Q. Have you ever been treated for mental illness or committed to an institution?

Miss Johnson: I object to that.

Miss Dembitz: I object to that.

A. No, I have not.

Q. Have you ever been convicted of an offense involving moral turpitude?

A. What is moral turpitude?

Miss Johnson: I think we ought to have the answer for the record.

The Witness: The answer is not for the record.

Mr. Metzger: No further questions. I have one further question.

Q. You testified, Mr. Ostrow, that you had certain duties and functions; is that right?

A. I am sorry?

Q. Did you testify that you were given a certain assignment on that day, as to where you would be?

A. I described all of the assignment I was instructed to [fol. 344] do.

Q. And you were to get on the periphery of the group; is that right?

A. That is right, yes.

Q. And did you testify that you were over on the—with reference to People's Exhibit Number 1—that you were over on the west side; isn't that right?

A. That is correct.

Q. And there was no one behind you, none of the demonstrators; is that correct?

A. That is correct.

Q. Did you ever go over on the other side and guard that periphery?

A. No, I was on the other side of the island after the police had arrived in force; but I was, of course, not functioning as a monitor at that point.

Q. Did you ever hand out any leaflets?

A. At what time?

Q. At any time in the afternoon. Did you ever hand out any leaflets, pamphlets, pieces of paper of any kind?

Miss Johnson: I object. What kind of pieces of papers [fol. 345] is the District Attorney—

Mr. Metzger: I don't know if that is material. I simply asked if he handed out pieces of paper.

Miss Johnson: I don't see why this is at all relevant to the charge here.

The Court: Objection overruled.

Q. Did you ever hand out any pieces of paper?

A. When?

Q. That afternoon at Duffy Square.

A. No, I did not.

Q. Did you ever have any pieces of paper in your hand?

A. Outside of the placards which I told you I picked up, to the best of my recollection, no.

Q. Mr. Ostrow, Mr. Ostrow, you are now testifying as a witness, under oath.

A. Yes.

Q. I am going to ask you once again whether you ever had in your hands, and I am not talking about placards; I am talking about smaller pieces of paper, eight by ten or in that area, not posters, smaller pieces of paper, did you ever [fol. 346] have any in your hands?

A. This is not the question. Did I ever hand any out?

Q. Did you ever have any in your hands?

A. Yes, I believe I had.

Q. All right, let me show you People's Exhibit Number 8. You identified the individual with the black arm band and black eyeglasses as being yourself; isn't that correct?

A. That is correct.

Q. And you see this paper in the right hand?

A. Well, it is blurred; and I am not quite sure what it is.

Q. What do you think it is? You look at it.

A. Let me hold it. To tell you the truth, it could be almost anything. Well, it is not a bread box.

Q. Does it look like a piece of paper, or pieces of paper?

A. I would not testify as to what it looks like.

Miss Dembitz: May I see it. What is it you are referring to?

Mr. Metzger: This is his hand, right here.

[fol. 347] Q. Now, at this time, were you on sentry duty, or were you on guard duty, as pursuant to the instructions that you told us you were under?

A. As that photgraph is not timed, I cannot give you an answer.

Q. All right. Did you have the arm band on the entire afternoon?

A. Yes, I did.

Q. Do you recognize the person carrying the placard behind you, the one that is right at the curb, right by the street, behind you? Do you recognize that individual?

A. This individual?

Q. Yes.

A. No.

Q. If you were on guard duty when this picture was taken—

Miss Johnson: Objection, Your Honor. He already testified he was not.

Mr. Metzger: There was no such testimony. He stated [fol. 348] he did not know the time the picture was taken.

Miss Dembitz: We object to being asked a hypothetical question.

The Court: The form of the question is bad. He never testified at any time that he was on guard duty. He said that he was there on monitor duty; is that correct?

The Witness: That is correct.

Mr. Metzger: I am sorry, Your Honor.

Q. If you had been on monitor duty at this time—

A. At what time?

Q. At the time this picture was taken. You concede it was taken at sometime?

A. Yes.

Miss Dembitz: I object to this hypothetical question.

The Court: Wait until he finishes the question. I have not heard the question yet.

Q. Would this individual carrying the placard, standing behind you, towards the street, have been one of the people [fol. 349] that you were supposed to keep on the other side of you?

Miss Dembitz: Will you please wait until the Judge considers my objection to this question.

I am addressing this remark to the witness.

I object to this hypothetical question, both because it is hypothetical and involved—

The Court: You don't have to go any further. The objection is sustained.

Mr. Metzger: Okay, thank you.

The Court: Tell me, you repeatedly referred to his gathering as a "demonstration."

The Witness: No, actually—

The Court: I am quoting you. You used the word five or six times. What do you mean by the word "demonstration"?

The Witness: Well, I used the word incorrectly, if I used it. I meant to say a peaceful meeting. It was not a demonstration.

[fol. 350] The Court: But I am quoting exactly what you said not once, but five or six times. You said that this was a demonstration.

The Witness: Yes.

The Court: Now, do you want to correct that?

The Witness: Yes, I would like to correct any time on the record that I mentioned "demonstration" I prefer it to be entered as "peaceful meeting."

Mr. Metzger: Your Honor, I have no further questions.

The Court: Any further questions?

Mr. Metzger: No, sir.

The Court: You may step down. We'll take a short recess.

Miss Johnson: Thank you, Your Honor.

(Whereupon there was a short recess.)

Miss Johnson: The defense would like to call Mr. Teahan.

Bridge Officer: Mr. Teahan, step forward. Raise your [fol. 351] right hand and face His Honor.

JEREMIAH TEAHAN was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Direct examination.

By Miss Johnson:

Bridge Officer: Be seated. State your name, address, and occupation.

The Witness: Jeremiah Teahan; 195 Prospect Place, New York; clerk.

Q. Can you speak up loudly so that we can all hear you clearly? What is your occupation?

A. Clerk.

Q. For whom do you work?

A. For the Western Union Telegraph Corporation.

Q. Were you in the Duffy Square area on Saturday afternoon of August the 8th?

A. Yes, I was.

Q. And what was your purpose in being in the area at that time?

A. I came to hear what the May 2nd Committee had to [fol. 352] say in regard to the foreign policy of the United States in Southeast Asia.

Q. Are you a member of the May 2nd Committee?

A. No, I am not.

Q. And there came a time this afternoon when you yourself, Mr. Teahan, were arrested?

A. Yes.

Q. Will you tell the Court the circumstances of your own arrest and what happened at the time you were arrested?

A. Well, during the time that I was arrested, horses had come from—just before this time had come and been on the Square, and there was great confusion; and people were afraid of being hit, stumped by horses, mounted horses of the police department.

Q. I just want to interrupt you for a second.

Mr. Metzger: Your Honor, if I heard what I thought I heard, may I ask that it be stricken: "that people were afraid of being stumped."

The Court: Yes, sustained. Strike it from the record.

[fol. 353] Q. I show you People's Exhibit Number 1, which is an aerial view of the Duffy Square area, and ask you to point out the point where you were just prior to and at the time you were arrested.

A. I was down in this section, near the curb. I had come over here, because Mr. Kunis seemed to be lying down.

Mr. Metzger: Indicating the southern end of the grating.

Miss Johnson: Near the Broadway curb.

The Witness: Near the Broadway curb.

Miss Johnson: That's correct.

Mr. Metzger: That is what it seems to me.

The Witness: Yes.

Q. Continue as to what you saw.

A. Well, I saw Mr. Kunis on the floor; and I believe Joyce Chadwick near there, seeing what had happened to him, also Bruno Eckhardt. I tried to see what had happened to him, but there were a great many policemen around; and they carried him to a car.

Q. Whom do you mean by "him"?

[fol. 354] A. Mr. Kunis, to a car.

Q. You saw him being carried to a car?

A. Yes, he was carried to a car.

Q. And, then, what happened?

A. Then Mr. Eckhardt, one of the defendants, went along to see if he was injured; and he went into the car with Mr. Kunis to see if he was injured.

Q. Where was this car located?

A. The car was located further north, about maybe 10, 15 feet, in this general area, by the curb.

Q. On the Broadway side of the Park?

A. Yes. Mr. Kunis was lying down near the curb. He was not in the street.

Q. You say Mr. Kunis was lying down?

A. On the sidewalk.

Q. On the sidewalk?

A. Yes.

Q. You saw him lying down on the sidewalk?

A. Yes.

Q. At any time, did you see Mr. Kunis lying down on the roadway?

A. No, I did not.

[fol. 355] Q. When Mr. Kunis was carried into the car, what is the route that he was carried to the car?

A. Well, the car was a little further north, five or ten feet. I wouldn't know exactly the distance that he was carried up there, towards the car, where he was placed there by a couple of policemen.

Q. Was he carried unto the street, or unto the sidewalk?

A. He was carried unto the street, where the car was.

Q. This was prior to your arrest?

A. Yes, this was prior to my arrest.

Q. How long before you were arrested? Can you approximate the time?

A. Considering all this, about a minute or two minutes before.

Q. And did you proceed north, then, to this car where Mr. Kunis was carried?

A. Somewhat, yes. I went over there. Bruno was there, and Bruno went into the car.

Q. Did you see Mr.—when you talk of Bruno, you are talking of the defendant Bruno Eckhardt; is that right?

[fol. 356] A. Yes.

Q. What exactly did you see Mr. Eckhardt do?

A. I saw him get in the car and sit down next to Mr. Kunis.

Q. How did he get into the car?

A. He walked in.

Q. Was he in custody of a police officer at that time?

A. No, he was not.

Q. Did you talk to either Mr. Kunis or Mr. Eckhardt at that time?

A. No, I did not.

Q. Prior to this day, Mr. Teahan, were you acquainted with, or did you know Mr. Eckhardt or Mr. Kunis?

A. No, I did not.

Q. And what are the circumstances of your own arrest?

A. Well, I then went down further. I was pushed away from there by several policemen. I looked around and saw a girl someone had been—some individual, a young man. I could not look at him. He was sprawled on the—[fol. 357] what do you call it?—the grill there, where the subway is, in the center of the park, was sprawled around there, and we could not get to it because two horsemen were going around, rapidly, charging at the people to keep them out of the center of the Square.

Q. And when were you arrested?

A. I was down further, near where Vincent Copeland was being taken to a squad car, and I believe Mr. Laub. I am not sure now. He also was in the car, but I knew Mr. Copeland had been taken to the car. At this point Captain McCallister was over there and pushed me out of the way, and pushed me into the street, in front of this squad car they were preparing—

Q. Can you identify that spot here on this photograph?

A. Yes. This would be, let's see now, down around here. This area here.

Mr. Metzger: Indicating the automobile on the west side of Duffy Square. It is a taxicab in the picture he is pointing to, the cab which is in between the area of the [fol. 358] foliage and southernmost part of the grillwork, the grating.

Q. Did you step into the street at that point?

A. No, I did not step into the street. I was pushed into the street.

Q. You didn't physically go into the street at that point?

A. Yes. A policeman at that time said, "Get out of the street." So, I looked around, and before I could another policeman came from out here and pushed me back unto the sidewalk, where I stayed in until another policeman—and I believe it was a sergeant, said, "What are you doing here?" and I said, "I am trying to stay away from the horses." In the confusion, somehow or other, someone pushed me. There were several policemen over here.

Q. Talk louder.

The Court: Step back. He is talking to you; and I am having difficulty hearing.

Miss Johnson: I am sorry, Your Honor.

Q. You said there were several police officers around? [fol. 359] A. Yes.

Q. And then—well, at what point were you placed under arrest; or were you told you were under arrest?

A. I was never told I was placed under arrest up to this point. Now, I was there when I was pushed onto the road. I was in front of the squad car. They were starting the motor, ready to step on the accelerator; and as this happened a policeman grabbed me from behind and said, "Come along with me," and took me to the car behind. There was a taxicab which was commandeered by the police department, I believe, where I was thrown into, where Key Martin and possibly Apter, had been already along with Policeman Walsh, who then, when I got in the car, told me that he didn't need a billy club; and pro-

ceeded to punch me in the mouth, with two witnesses present.

The Court: Did you know any of these defendants before this meeting on this particular day?

The Witness: Yes, I was familiar with a couple of the defendants.

[fol. 360] The Court: Whom did you know?

The Witness: Vincent Copeland and Pierre Meisner, and also Key Martin.

The Court: Did you know anybody else?

The Witness: No, I did not.

The Court: I noticed that several times here in referring to the defendants you referred to them by their first names.

The Witness: Well, since the time of the arrest I have had occasion to know them in return dates to trial and to become familiar with them.

The Court: So, that is how you happen to know their first names?

The Witness: Yes.

The Court: All right.

Miss Johnson: I have no further questions, Your Honor.

Cross examination.

By Mr. Metzger:

Q. You say you are a clerk with the Western Union, [fol. 361] Mr. Teahan?

A. Western Union Telegraph Corporation.

Q. How old are you, sir?

A. 18 years old.

Q. Do you go to school?

A. Not at the moment, no.

Q. Do you live home with your parents?

A. No, I do not. I live with a friend, in Brooklyn.

Q. Now, you testified that they were carrying Bruno?

A. No, I did not.

Q. Who were they carrying?

A. No, I testified to the effect that Mr. Kunis—

Q. Do you recall the color shirt Mr. Kunis was wearing on the day in question?

A. No, I was not looking at this shirt.

Q. Let me ask you this: Did you hear the reporter from the New York Times testify here this afternoon?

A. Yes, I heard the testimony.

Q. Do you recall that aspect of his testimony about someone in a green shirt being stiff like a pole; do you recall that?

A. Yes, I recall the testimony.

[fol. 362] Q. Was that Mr. Kunis, as to your recollection?

A. To my recollection, No, Mr. Kunis had gone by then.

Q. He had gone by then?

A. He was limp.

Q. He was what?

A. He was in passive resistance.

Q. I believe the witness testified he had gone limp. He had gone limp?

A. Yes.

Miss Johnson: It is an expression.

Q. Where was he when he went limp?

A. I believe that I stated that before, on the picture.

Q. Look, you just answer the question.

A. Yes. It was about 15 or 20 feet up right along the curb, towards the north side.

Q. By the way, did you tell—did you yell out, "fascist police, police brutality," at the time?

A. Not as I recall.

Q. "Fascist cops"?

A. "Fascist cops"?

[fol. 363] Q. Yes.

A. Not as I recall. I might have in a moment—but it does not stick in my mind as such.

Q. Did you see the defendant Apter, Robert Apter being arrested?

A. No, I did not. I had not seen him.

Q. Do you recall the testimony of the officer that arrested you, when he said that he saw you pulling the defendant Apter from the officer that was arresting the defendant Apter?

A. That testimony is erroneous. I never saw Mr. Walsh —Patrolman Walsh until I was taken into the taxicab. Never had I seen Mr. Apter the entire afternoon until I was taken into the taxicab.

Q. You said Apter?

A. Yes.

Q. Do you recall the officer's testimony that you were lying down on the street?

A. That I was lying on the street?

Q. Yes, sir.

A. No, I do not recall that testimony.

Miss Dembitz: I move, Your Honor, that the question and answer be stricken. There was no such testimony.

[fol. 364] The Court: What is this defendant's name?

Mr. Metzger: This is Teahan. Officer Walsh gave the testimony. My notes indicate otherwise, but I am in error apparently. It was the defendant Apter that was lying on the street. At least, that is what the testimony was.

Q. Did you see Apter lying on the street?

A. No, I did not.

Q. Did you try to pull Apter away from Officer Walsh?

A. No, I did not. I had not seen either one of them until I was taken into a taxicab, after I was arrested.

Q. Have you ever been convicted of a crime?

A. No, I have not.

Q. In this state or any other jurisdiction?

A. No.

Q. Have you ever been treated for a mental illness?

A. No, I have not.

Q. Have you ever been confined to an institution as a [fol. 365] result of a mental illness?

A. No, I have not.

Q. I see. Is the person you live with in court today?
A. Excuse me?
Q. Is the person you live with in the court today?

Miss Dembitz: I object. This is irrelevant.
Mr. Metzger: All right, I will withdraw it.
The Court: Sustained.

Q. Mr. Teahan, you testified that you were down in the southerly area of Duffy Square. Did you confine yourself to this area? Were you ever at the other end?
A. Which end?
Q. Near the steps, here.
A. Yes, when the meeting started.
Q. When the meeting started? I see. Did you see the defendant Key Martin?
A. No, I had not.

Mr. Metzger: I have no further questions.
[fol. 366] Miss Dembitz: No questions.
Miss Johnson: I would like to call the defendant Key Martin.
Bridge Officer: Step up here. Raise your right hand. Face Your Honor.

Key Martin was called as a witness on behalf of the defendants, and after having first been duly sworn, testified as follows:

Direct examination.

By Miss Johnson:

Bridge Officer: Be seated. What is your name, address, and occupation?
The Witness: My name is Key Martin. I live at 311 West 19th Street. I am a clerk.

Q. By whom are you employed, Mr. Martin?
A. I am employed by the Marguerite Sanger Research Bureau.

Q. On the afternoon of Saturday, August 8, were you in the vicinity of Duffy Square, Manhattan?

A. I was.

Q. What was your purpose in being at that location at that time?

[fol. 367] A. I was there to speak on behalf of Youth Against War and Fascism, at a rally opposing the United States War in Viet Nam, and opposing what seemed at that time to be the imminent expansion of that war.

Q. And did there come a time on that afternoon, Mr. Martin, that you were arrested?

A. Yes.

Q. I show you here a photograph which is an aerial view of Duffy Square, and ask you if you will indicate the place where you were when you were arrested?

A. I was close to the lamppost on the Broadway side of Duffy Square, just perhaps a little bit south.

Q. Indicating the lamppost on the western edge of Duffy Square, which is about midway of the grating.

Q. And what were the circumstances of your arrest, Mr. Martin?

A. Well, I had been on the top of the stairs on the south end in front of the Father Duffy Monument. After Mr. Copeland and Mr. Meisner, both defendants in this case, were later led away by the police, I followed, because of concern for my fellow-speakers. I was approximately—I moved from the top of the stairs to that approxi-[fol. 368] mate spot, where I was approached by an officer; maybe, perhaps, a minute had gone by when I was approached by an officer who said, "Do you want to go too, Bud?" and I could see him only out of the corner of my eye. I reeled a little bit, and he grabbed me under an arm; and another officer grabbed me under this arm; and they carried me to a cab, where the defendant Apter and Patrolman Walsh were already in; and they threw me in the front seat."

Q. Do you know who the officer was who put you in the taxi?

A. The tall officer in the back, Engelhardt, or something of that sort; and I believe it was Officer McNulty.

Q. Did you see the defendant Apter being—when he was arrested?

A. On that day I had not seen the Defendant Apter until I was inside the cab.

Q. Were you one of the people at this meeting who was wearing a black arm band?

A. No, I was not.

Miss Johnson: I have no further questions of this witness.

[fol. 369] Cross examination.

By Mr. Metzger:

Q. Who did you say you work for?

A. The Marguerite Sanger Research Bureau.

Q. How old are you Mr. Martin?

A. Twenty-one years old.

Q. Do you live at home?

A. I life with my wife, at home.

Q. And did you see Mr. Teahan get arrested?

A. I did not see Mr. Teahan that day until I was in the cab.

Q. You did not see Apter until you got in the cab?

A. Yes.

Q. Do you recall Officer Walsh's testimony?

A. I do.

Q. Do you recall him testifying that you attempted to interfere with the arrest of Teahan and Apter?

A. He did not testify that I interfered with the arrest of Teahan. He testified that I interfered with the arrest of Apter, which is not true.

Q. You say you did not interfere with the arrest of [fol. 370] Teahan as well?

A. I did not interfere with the arrest of anyone.

Q. Did you yell out, "Fascist police. Police brutality. Fascist cops," or anything that corresponds to that, in substance?

A. I may well have.

Q. You what?

A. I may have.

Q. You may have?

A. Well, probably.

Q. Do you usually yell out things like that? Are you supposing that you may have, or do you recall?

A. To the best of my recollection, I may have, yes.

Q. Did you see Teahan on that day before you got into the cab?

A. When I was in the cab?

Q. Before you got into the cab.

A. Not that I recall.

Q. Don't you remember one time he was about a foot and a half away from you, when you were standing around Vincent Copeland?

[fol. 371] A. (None.)

Q. Or don't you remember what happened much during that day?

A. I remember quite well what happened on that day. I don't recollect his standing a foot and a half away from me. Things happened at a very fast rate, and you don't have to observe everything.

Q. Now, there came a time when you were arrested and taken into the cab; is that right?

A. Correct.

Q. How many officers were carrying you?

A. There was one on each arm, and one poking me on the ribs or kidneys, on the back of me, on each side.

Q. What were you doing that necessitated all those officers, if you recall?

A. I don't know.

Q. Well, were you resisting?

A. No, I was not.

Q. Kicking?
A. No.
Q. Screaming?
A. No.

[fol. 372] Q. Is this you in Defendant's Exhibit "A"? Is this you, the man depicted; that is, the individual depicted in the picture?

A. Yes.

Q. Do you see how many officers are around you and holding you?

A. Four.

Q. And do you recognize this plainclothes officer, here?

A. That is the officer standing over there, sitting over there.

Q. Detective Baher?

A. Detective Baher.

Q. You don't remember just what you were doing at that moment?

A. Sure, I was in excruciating pain, because they were jabbing me in the kidneys.

Q. Is that right? All four of them, or just one of them?

A. It was hard for me to observe from my vantage point exactly how many were poking me in the kidneys.

Q. Isn't it a fact you were resisting so violently that it [fol. 373] took four officers to hold you down?

Miss Johnson: I object, Your Honor. The defendant is not being charged with resisting arrest. That has nothing to do with the Complaint here.

Miss Dembitz: And there was no testimony by the arresting officer as to that.

The Court: The objection is overruled.

Q. Did you go the hospital that night?

A. I was in jail that night.

Q. Did you ever go to the hospital about your kidneys?

A. No.

Q. I see. Did you ever receive any medical treatment as a result of being excruciatingly poked in the kidneys with a nightstick?

A. No, I was just doubled over in the cab for a while. The pain went away after a while.

Q. I don't think you answered my question, my question at the time there was an objection. The reporter will read it back.

[fol. 374] Court Reporter: "Isn't it a fact you were resisting so violently that it took four officers to hold you down?"

A. As a matter of fact, only two officers were holding me; and I was not resisting violently.

Q. You say you may have said, "Fascist cops," and "police brutality" at some period during this time?

A. Yes.

Q. Would that have included this period that you were being carried to the police car?

A. No.

Mr. Metzger: All right, no further questions.

The Court: All right, you may step down.

All right, I think we'll recess this case until tomorrow morning at 9:30, 9:30 tomorrow morning.

[Court Reconvenes at 9:30 on November 2, 1964]

Bridge Officer: These are continued cases. William Turner and 16 others. Vincent Copeland and Levy Laub.

[fol. 375] The Court: All right, you may proceed.

Miss Dembitz: I first want to offer an offer of proof for the record with respect to Mr. Leliveld's testimony yesterday: That if he had been allowed to answer my question, "Did you have a conversation with Captain McCallister?" a question to which Your Honor sustained an objection, he would have testified that he spoke to Captain McCallister before leaving Duffy Square, between the hours

of 4 and 5 o'clock on August 8; that he asked Captain McCallister why the meeting had been broken up; and that Captain McCallister replied that the reason was that all meetings were banned in the midtown area.

I make this offer of proof for the record.

The Court: The Court adheres to its previous ruling, with an exception to the defendants.

[fol. 376] Miss Dembitz: Thank you.

Miss Johnson: Your Honor, the defense would like to recall one of the previous witnesses, Mr. Luce.

Bridge Officer: Mr. Luce, step forward.

Mr. Metzger: Your Honor, the People move at this time to exclude any witnesses from the courtroom.

The Court: Yes, that still holds. All witnesses in this case, on both sides, who have not testified are excluded from the courtroom until called.

You are still under oath, Mr. Luce.

PHILIP LUCE was recalled as a witness for the defendants, and having previously been sworn, testified as follows:

Redirect.

By Miss Johnson:

Q. You are still under oath. When you were testifying yesterday, I believe you said that when you first came unto the Duffy Square scene—that it was before 4 o'clock; is that correct?

[fol. 377] A. Yes.

Q. How long before the meeting actually got going; in other words, how long before the speakers started speaking were you there?

A. Maybe a half an hour.

Q. Did anyone from the police department, any representative from the police department or any official from the City of New York speak to you or any of the other leaders of the group during that time?

Mr. Metzger: Objection as leading, Your Honor, and suggestive.

The Court: Objection overruled.

A. When we—

Mr. Metzger: I ask that the answer be stricken as not being responsive.

Miss Johnson: He has not answered.

Mr. Metzger: That part of the answer that he has.

The Court: Well, he is using the word, "we." The objection is sustained and it is stricken.

Q. You specifically, if you had any conversations or if [fol. 378] you were present when conversations were had. So refer to this as "I" rather than "we."

Mr. Metzger: Your Honor, additionally, this calls for yes or no. If he is going to give the conversation—

The Court: Well, first the answer would be yes or no, and then she may pursue it after that.

Miss Johnson: All right.

A. Yes, I do recall having a conversation with a uniformed policeman. To the best of my knowledge he was a policeman. The reason that I base that assumption on is the fact that he had a triangle in his lapel, along his lapel, a small triangle either in green with a white circle, or white with a green circle. To the best of my recollection he came up to some of us who were gathered there and said, not specifically to me, but to us—

Mr. Metzger: Your Honor, this is objected to as not being responsive to the question; the question being, "Did you have a conversation with a police officer?"

Miss Johnson: The question included, did he have a [fol. 379] conversation or was he present when the conversation was had.

The Court: He is being asked to give the conversation. The objection is overruled.

A. And to the best of my recollection the uniformed police officer said that we could not hold a meeting there; that there was a ban on demonstrations in Times Square; that we could move either north of 59th Street or south of 40th Street and hold a meeting; but that no meetings would be allowed within that area. To the best of my recollection someone, or myself, said "Thank you." He left and we went back.

Q. Did this particular gentleman return with Captain McCallister, or did Captain McCallister come on the scene?

A. I did not see him.

Miss Johnson: I have no further questions.

The Court: Anything else?

Mr. Metzger: No questions.

The Court: All right, step down.

[fol. 380] Miss Johnson: Now, the Defense would like to call the Defendant Robert Apter.

Bridge Officer: Raise your right hand and face the Judge.

The Court: Do you swear—

The Witness: I affirm.

The Court: Do you affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth so help you God?

The Witness: I do.

Bridge Officer: Give your name, address and occupation.

The Witness: Robert Apter, 210 East 17th Street. I am secretary of a print shop.

Mr. Metzger: What?

The Witness: Secretary of a print shop, company.

Direct examination.

By Miss Johnson:

Q. Mr. Apter, were you present on the Duffy Square area on the afternoon of Saturday, August 8?

[fol. 381] A. Yes, I was.

Q. Did there come a time on that afternoon when you were arrested?

A. Yes.

Q. You heard yesterday morning, you heard the testimony of Officer Walsh, who testified he arrested you; is that right?

A. Yes.

Q. Will you tell us what you were doing at the time you were arrested and—well, before you do that, will you point out where you were, on the aerial view, People's Exhibit 1? Where exactly were you at the time you were arrested?

A. At the time I was arrested I was right here.

Miss Johnson: Indicating the—

A. I would say just off the grating.

Miss Johnson: Indicating the Broadway side of the grating, which is the west, to the west, approximately in the center of the subway grating.

Q. All right, Mr. Apter, what were you doing at the time you were arrested?

[fol. 382] A. Just a few seconds before I had seen Mr. Walsh for the first time, this police officer, on top of a horse came charging at us, yelling in somewhat of a Nazi-like fashion.

Mr. Metzger: Your Honor, that is objected to.

The Court: Yes, strike it out.

A. And I was moving around to get away from the oncoming horse. Mr. Walsh, Officer Walsh, grabbed me and

said, "If you don't move you will be arrested," and I objected, saying I had a constitutional right to be here; and then he just—he went to grab someone else, and I moved away. A few seconds later—I was urging people to stay there and to regroup and have a peaceful meeting. A few seconds later there he was again, and he grabbed me, and he said, "I told you to move. You are under arrest." And I had under my arm a group of newspapers which I had been trying to sell to the people there, and a placard; and he grabbed me, and he walked me to a taxicab which he had stopped, or an officer had stopped; and he got in, and somebody else pushed me from the back; and I was [fol. 383] pushed into the cab.

Q. All right. Did you at any time sit down or lie down on Duffy Square?

A. No.

Q. At any time did either the defendants—did either the defendant Key Martin or the Defendant Teahan interfere with your arrest?

A. I did not see them until I was inside the taxicab. That was the first time I had seen them during that day.

Q. What do you mean; they were inside the same taxicab that you were in; is that correct?

A. Teahan was on the left of the taxicab. Officer Walsh was in the center; and I was on the right; and a few seconds later, after I had been pushed into the cab, Key Martin was pushed into the taxicab on the front right.

Q. Was Teahan in the cab when you were there, or who was first?

A. I think Teahan was first. I may be mistaken, but what I am saying is that I never saw either of them until I was inside the cab; and I recollect that they were there. [fol. 384] Q. Mr. Apter, there has been testimony that a number of people at this meeting were wearing arm bands. Were you wearing an arm band?

A. Yes, I was.

Q. What was the purpose of wearing the arm band?

A. Well, there was a group of us who were asked, as we got into the demonstration that day, to monitor the crowd; in other words, to keep people in an orderly fashion and not to have them spilling into the street or obstructing traffic; and Miss Shallitt told me, asked me to do this; and we stood, I stood, on the periphery of the crowd.

Q. Will you show us on People's Exhibit 1 where you were stationed?

A. I was stationed right over here.

Q. On the Seventh Avenue side, on the eastern side of the Square, about the middle of the grating?

A. Right.

Miss Johnson: I have no further questions.

Cross examination.

[fol. 385] By Mr. Metzger:

Q. Where were you selling the newspapers, Mr. Apter? Will you point to the spot?

A. What time are you speaking of?

Q. Where did you sell them, at any time?

A. Over here. I was over here before the meeting started, walking around here.

Mr. Metzger: You are indicating the sidewalk; is that right?

The Witness: Yes. This is before the meeting started.

Miss Johnson: May we have the testimony louder?

The Court: Yes.

A. I was selling the newspapers along the sidewalk before the meeting started.

Q. What newspaper were you selling?

A. The newspaper called "Challenge."

Q. Now, you testified that you were telling people to stay there after the officers were telling them to move on; is that right?

A. That's right.

[fol. 386] Q. Were you running around and screaming yourself?

A. Yes.

Q. And did you yell out "Fascist cops," or something to that effect?

A. After seeing the behavior of the police, absolutely.

Q. Just a minute, hold it.

The Court: You may proceed.

Q. I had asked you whether you were yelling out at this period when you were telling the people not to listen to the police, and that you would continue the demonstration. I asked you whether you were yelling out the words, "Fascist cops," or anything like that, in substance.

A. I said, after seeing the behavior of the police, yes, I did say things of that sort.

Q. All right, when Officer Walsh attempted to place you under arrest, or did place you under arrest, did you throw yourself on the ground?

A. Excuse me. I didn't hear the first part of the question.

Q. When Officer Walsh attempted to place you under [fol. 387] arrest, or did place you under arrest, did you throw yourself on the ground?

A. No, that is a complete fabrication.

Q. Were you ever down on the ground?

A. No.

Q. How long did you run around telling people to stay in the demonstration, not to listen to the police?

A. I have no idea.

Q. Do you recall what you said? Do you recall the words?

A. I assume it was something to the effect that we had a constitutional right of free assembly and free speech there, and the police had no right to disperse the crowd, since it was a peaceful assembly.

Q. I see. Have you ever been convicted of a crime?

A. No.

Mr. Metzger: No further questions.

The Court: You may step down.

Miss Johnson: The Defense will call the Defendant Bruno Eckhardt.

Bridge Officer: Raise your right hand and face the Judge.

[fol. 388] BRUNO ECKHARDT was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. State your name, address, and occupation.

The Witness: Bruno Eckhardt, 148 Delancey Street. My occupation is painter.

Miss Johnson: What is your occupation?

The Witness: Painter.

Direct examination.

By Miss Johnson:

Q. Mr. Eckhardt, will you talk slowly. We want to make sure that everyone understands your testimony.

Q. Were you in the Duffy Square area of New York City on Saturday afternoon, August 8?

A. Yes, I was.

Q. And how did you happen to be in the area at that time?

A. I came there with the puppet theater group to attend the meeting and to hear what had to be said.

Q. What do you mean by the puppet theatre group?

A. By our puppet theatre group. We have a puppet [fol. 389] theatre, and we came with our puppets to attend the meeting.

Q. What was the reason for your having the puppeteers with you at that time?

Mr. Metzger: I am going to object, Your Honor, as not being material and relevant and calling for a self-serving declaration on the part of the witness.

Miss Johnson: Your Honor, there has been considerable testimony by the police that there were people at this meeting who were dressed in costumes and had effigies; and we want to clarify that.

Mr. Metzger: Those are the puppeteers?

Miss Johnson: These are the puppeteers.

Mr. Metzger: I withdraw the objection.

The Court: All right, go ahead.

Q. Will you explain what kind of equipment you had with you, and what the purpose was in your having this equipment at this time?

[fol. 390] A. We had a four-head soldier puppet, which was held by two men wearing skull masks. We also had one big kettle drum, which I played, and which I stopped to play when the officer told me so.

Q. Were you or any of the people with you in costume?

A. No, no costume.

Q. Was anyone wearing a mask or—

A. I was wearing a mask, and I think a friend of mine, who was holding a puppet, was wearing a mask; but I am not sure about this.

Q. Well, what was the reason you had on all this equipment with you at this particular time?

A. Well, if you see a soldier, puppets with men wearing skull masks, then the purpose of this is quite clear, and it fits to the issue of this meeting.

Q. Do you regularly have shows at the puppet theatre?

A. That's right.

Q. Where do you have your shows?

A. 148 Delancey Street, and also in Brooklyn, at the [fol. 391] Spencer Memorial Church.

Q. I see. Mr. Eckhardt, you have an accent; where do you come from?

A. I come from Germany.

Q. How long have you been in this country?
A. Four years.
Q. Are you a citizen of the United States?
A. No.
Q. Have you ever been arrested before?
A. No.
Q. Have you ever been in a courtroom before?
A. No.

Mr. Metzger: I ask that the last two questions be stricken, Your Honor, the questions and answers.
The Court: Strike it out.

Q. Now, at the time you were arrested—or there came a time on this Saturday afternoon that you were arrested; is that correct?
A. Not on the Square.
Q. Well, were—where were you when you were arrested?
A. I was told that I was arrested in the station house, [fol. 392] in the police station house.
Q. Well, what happened at Duffy Square—how did you get from Duffy Square to the station house?
A. I followed my friend Arthur Kunis, who was carried by the police into the patrol car; and I followed him; and I opened the door of the police car myself; and I sat down next to Arthur Kunis; and there was nobody talking a word to me, nobody.
Q. Did you see your friend Kunis lying down on the Square?
A. I saw Arthur Kunis sitting down, going limp, as they call it. But he was sitting on the sidewalk, and he was not sitting on the street. I remember this very clearly.
Q. Were you sitting on the sidewalk?
A. I was not sitting at all. I was standing.
Q. Were you carried or lifted in any way to the car?
A. I was not even touched.
Q. Is Mr. Kunis part of your puppet group?
A. That's right.

Miss Johnson: No questions.

[fol. 393] Cross examination.

By Mr. Metzger:

Q. Mr. Eckhardt, you were wearing a hat and carrying a drum, a decorative hat of some kind?

A. No, I was wearing a skull mask on my head so I could see better when the excitement went on.

Q. I see. Did you hear Officer Fay testify?

A. Pardon me?

Q. Did you hear the officer that talked about you? Did you hear him testify here?

A. Yes.

Q. Did you hear him testify that you ran out and lay down on the street on Broadway? Did you hear that?

A. I heard him say that, yes.

Q. And that when he told you to get up and said that if you did not get up you would be arrested you raised your hands up in the air and you said, "Here I am." Do you recall that testimony?

A. I remember this, yes.

Q. Did that happen? Did you do it?

A. No.

[fol. 394] Q. It didn't happen at all?

A. No, it didn't happen at all.

Q. I see. When is the first time that you saw the officer?

A. The first time—well, this officer, I suppose, went with me in the patrol car; but I was too excited to look at any faces of those officers who were with me. And the first time I remember my arresting officer very well was when he talked to me, when he wrote down my address and my name, like he does to everybody he is arresting there.

Q. What was this mask you were wearing, by the way?

A. Pardon me?

Q. What did this mask represent here, if you know?

A. This is a skull mask.

Q. What is a skull mask?

A. A death mask.

Q. Is that part of your puppet show?

A. We use it in part of our puppet show.

Q. This is not a children's puppet show, is it?

A. No.

Q. I see. You don't recall lying down on Broadway?

[fol. 395] A. Pardon me?

Q. Were you very excited at the time?

A. Well, I was able enough to see clearly what was going on.

Q. But you don't remember the officer until you got to the police station?

A. That is correct.

Q. Even though you were in the same car with him?

A. That is correct.

Q. And do you remember what you did in fact during that whole period of excitement? Do you have any real distinct recollection today?

A. Yes.

Q. You don't recall lying down on the street?

A. I was not lying down on the street. This is impossible, since I had a big kettle drum strapped to my body.

Q. Suppose I show you—since it was strapped to your body, did you have any difficulty getting into the police car with your buddy Kunis? Did it get stuck on the door?

A. I went—

[fol. 396] Q. I think you can answer with yes or no. Did you have any difficulty getting into the cab?

A. I cannot answer this question at this time. I did not have the kettle drum.

Q. Well, did you have the kettle drum when you were down on Broadway?

A. Yes.

Mr. Metzger: No further questions.

Miss Dembitz: I believe the witness is confused. His knowledge of the English language is not complete, and I think the Prosecutor deliberately confused the witness in the last question. I move the question and answer be stricken. He gave him a rapid-fire series of questions,

and I am sure this does not represent truthfully the testimony which this witness intends to give.

And I move that the question and answer be stricken; and that the Prosecutor be permitted to continue this examination if he cares to.

The Court: The motion is denied.

[fol. 397] The Court: Tell me what you were doing with this kettle drum that was strapped to your back, or wherever it was strapped? What were you doing with it?

The Witness: I was beating this drum for approximately five minutes, in the beginning of the speeches.

The Court: What was your purpose in beating this kettle drum?

The Witness: To attract the attention.

The Court: For what purpose?

The Witness: To attract the attention of the people that were on the Square, and to attract attention to our puppets and our masks.

The Court: Well, whose attention were you trying to attract?

The Witness: Well, Your Honor, if you have a play going on, and a puppet show, you usually have some music with it. So, this was the same idea.

The Court: I am trying to find out whose attention were you trying to attract? Were you trying to attract [fol. 398] the attention of people who were walking up and down on the streets?

The Witness: I was not conscious about this.

The Court: Well, what was your purpose? I withdraw that. You knew you had a group of your own colleagues there, did you not?

The Witness: Yes.

The Court: You didn't have to beat the drum to attract their attention, did you?

The Witness: Well, it was one form of our theatre to protest against war.

The Court: And who, again, when you were beating the drum, whose attention were you trying to attract?

The Witness: Everybody's attention, Your Honor. I cannot say whose attention, the people on the street, or the people in the meeting. I really wouldn't know what to say about this.

The Court: And how were you beating this kettle drum? [fol. 399] The Witness: I was beating it with a wrapped up ball attached to a stick.

The Court: And was the sound that emanated loud or soft?

The Witness: It is a hollow sound, a deep, hollow sound.

The Court: Is it similar to what is familiarly known as a bass drum?

The Witness: Yes.

The Court: All right.

Miss Johnson: I have a few more questions.

The Court: You may step down. I am sorry.

Redirect examination.

By Miss Johnson:

Q. How long were you playing the drum?

A. Well, I can remember no longer than five minutes.

Q. And why did you stop playing the drum?

A. A police officer came over to me and said, "Stop beating this drum," and I did so.

Q. Were you told prior to this time—were you told by [fol. 400] anybody to stop beating the drum?

A. No.

Q. Were you present at the time when speakers were speaking through the microphone—through the megaphone?

A. Yes.

Q. Did you beat your drum at the time the speakers were speaking?

A. I think I was beating the drum in between breaks. That is what I can remember.

Q. When did you take off—you said earlier, in answer to a question from the District Attorney, that you took the kettle drum off—that you were wearing it and you took it off. When was that?

A. This happened when I—I had to tell first that I was on my way to the station wagon.

Mr. Metzger: I object to this as not being responsive.

The Court: Strike it out. Listen to the question and answer the question.

The Witness: Yes.

The Court: The question is very simple. The lawyer [fol. 401] wants to know when did you take it off.

A. I took it off when I saw our puppets laying on the street. This is very valuable puppets, and my friend Arthur Kunis was—went limp on this moment, when he probably got pushed, and the puppets fell on the street.

The Court: Strike it out. We are not interested in what probably happened. We can only take in this court what you actually saw.

Q. Mr. Kunis had been arrested at the time?

Mr. Metzger: Objection, it calls for a legal conclusion.

The Court: The objection is sustained.

Q. Was Mr. Kunis in the custody of police officers and being taken to the car at the time you took the kettle drum off?

A. Yes.

Q. What is this puppet that you said you saw on the street?

A. Yes, that was our puppet.

[fol. 402] Q. Where was the puppet?

A. It was, so far as I can remember, laying half on the street and half on the sidewalk.

Q. How big is the puppet?

A. It is over life size.

Q. Mr. Eckhardt, did you ever lie down on either the sidewalk or in the street prior to your arrest?

A. I did not.

Miss Johnson: I have no further questions.

By Mr. Metzger:

Q. Did you take the puppet into the car when you went to visit Mr. Kunis?

A. My friend, Burt Shumman, who was running the theatre, took the puppets with him, and also the kettle drum.

Miss Dembitz: We have no further questions.

Mr. Metzger: No questions.

The Court: You may step down.

Miss Johnson: You can step down, Mr. Eckhardt.

[fol. 403] At this point the Defense would like to call the Defendant Joyce Chadwick.

Bridge Officer: Will you raise your right hand and face the Judge?

Joyce Chadwick was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. Give your name, address, and occupation.

The Witness: Joyce Chadwick, 28 Avenue B, secretary.

Mr. Metzger: I can't hear the witness.

Miss Johnson: Speak up. Speak up.

Direct examination.

By Miss Johnson:

Q. What is your occupation?

A. Secretary.

Q. Miss Chadwick, were you in the Duffy Square area on Saturday afternoon, August 8?

A. Yes, I was.

Q. And did there come a time on that afternoon when you were arrested?

[fol. 404] A. Technically.

Q. Were you placed under arrest on that afternoon?

A. Yes.

Mr. Metzger: I still can't hear the witness' mumbling.

Q. You will have to speak loudly so that not only everyone hears you, but also the defendants hear you. Do you know the witness that just testified, previously, Mr. Eckhardt?

A. Yes, I do.

Q. All right, are you associated with Mr. Eckhardt in any way?

A. I have been a friend of his for several months.

Q. Were you with him on the day in question?

A. What do you mean with him?

Q. Were you with him? Were you part of this puppeteer group?

A. No, I wasn't—yes, I came to the meeting with Mr. Kunis and Mr. Eckhardt; but I was not a part of the group. I was simply a friend, and I came because I wanted to hear the speeches. I wanted to become informed, that's all.

[fol. 405] Q. Did you see Mr. Kunis lie down on either the street or the sidewalk?

A. Yes, I saw Mr. Kunis—I am not sure whether it was lie down or sit down; but I certainly saw him at least sit down on the sidewalk.

Q. And what happened after that?

A. After that? The police came. Well, the police were there. The police lifted him up and took him to a patrol car; I believe it was.

Q. Did you see Mr. Kunis being carried by the police officers?

A. Yes, I did.

Q. At any time, did you see him sit down or lay down in the street, off the curb?

A. Never.

Q. I show you now People's Exhibit 1, which is an aerial view of Duffy Square. Can you point out exactly where you saw Mr. Kunis sit down or lie down?

A. On the steps over here. We were standing on the steps, here. He was, I believe—

Q. Speak up louder.

A. He was standing on the steps in front of Father Duffy, [fol. 406] with me, when the mounted patrolmen came in from the—

Q. From the south?

A. From the south end, and both of us were shocked and appalled. Both of us were shocked by the actions of the mounted patrolmen.

Mr. Metzger: Your Honor, I am going to object to that.

The Court: Yes, strike it out.

Mr. Metzger: Did I hear that correctly?

Miss Johnson: She was shocked and appalled.

Mr. Metzger: That is not material, what she was.

The Court: Strike out "shocked and appalled."

You see, we run into the same difficulty if you stand there alongside of her. She will be talking to you. I have to hear her. So I ask you, so that we can all hear, including the defendants, who are entitled to hear her testimony, [fol. 407] stand back so she will project her voice.

A. Mr. Kunis and I were standing on the front steps of Father Duffy.

Miss Johnson: Indicating the steps to the south of the statue.

A. Yes, when the police approached us and approached Mr. Kunis. At which time Mr. Kunis walked down, off the steps, onto the sidewalk and sat down on the sidewalk, not in the street.

Q. You say he did this in front of the statue, or is that—
A. No, we had moved over by this time, because the mounted police horses were pushing us, as well as the police on foot.
Q. Well, where was it exactly? Will you point to exactly where Mr. Kunis was when he sat down?
A. I would say, here.

Miss Johnson: Indicating the western side of the enclosure of the Father Duffy statue, between the steps and the Broadway roadway.

[fol. 408] Q. Did you observe Mr. Eckhardt at that time?
A. I don't remember. It was very confusing. Things were happening very fast. I believe he was standing alongside of me.
Q. Did you see Mr. Eckhardt sit down or lie down on either the sidewalk or in the roadway?
A. No, I never saw Mr. Eckhardt do anything like that.

The Court: Will you keep your voice up, please. Please keep it up, because we have to hear you.
Miss Johnson: I have no further questions at this time, Your Honor.

Cross examination.

By Mr. Metzger:

Q. You say you are a friend of Mr. Kunis?
A. Yes, sir.
Q. Do you reside with him?
A. No, I don't.

Miss Johnson: I object to that, Your Honor.
The Court: Objection overruled.

[fol. 409] Q. When you were arrested and brought to the station house, were you asked to give your name and address?
A. Yes, I was.

Q. Did you give your name and address?
A. Yes.
Q. Is your name Jane Doe?
A. Not, it is not. May I explain?
Q. Have you ever been known by the name of Jane Doe?
A. Yes, I have. May I explain the circumstances?
Q. That is the answer.
A. May I say whom I was known by that by?
Q. I didn't ask you that.
A. If I may say so.

The Court: No, please, don't volunteer answers until you are asked questions.

Miss Dembitz: Wait a minute, please. Most of the witnesses have never appeared in a courtroom, and they are really not accustomed to testifying from the witness stand or any place else. So, we'll do our best.

[fol. 410] Q. Were you with Mr. Kunis when he was asked his name and address at the police station?
A. Yes, I was.
Q. What did he say?
A. I don't remember exactly.
Q. Was Beanie the expression he gave when he gave his name?
A. Something of that nature. I don't remember exactly.
Q. Miss Chadwick, did you hear Officer Englehart testify with respect to your activities?
A. Yes, I did.
Q. Did you hear him testify that you punched him and that you tried to bite him?
A. Yes, I did.
Q. Did you?
A. I don't believe I punched him. I did try to bite him.

Mr. Metzger: Okay, no questions.

The Court: When Mr. Kunis was sitting down, did you sit down alongside of him?

[fol. 411] The Witness: No, I did not.

Q. Did you sit down on the sidewalk?
A. No.

The Court: At no time?
The Witness: May I explain?
The Court: Yes, go ahead.
The Witness: I didn't sit down on the sidewalk. I sat down on the stairs, after Mr. Kunis was taken away.
The Court: Did the officer tell you to get up and you refused to get up?
The Witness: The officer said something to me. I don't remember exactly what it was; and at the time I was dumbfounded and couldn't speak, literally.
The Court: When Mr. Kunis was taken away by the police officer, did you yell out, "Fascists, let him alone"?
The Witness: I couldn't speak, I repeat. I was dumbfounded by the whole actions of everyone.
The Court: Did you, or did you not use that expression?
[fol. 412] The Witness: No, I did not. I did not say anything.

Q. You said you were dumbfounded?
A. Yes.
Q. Well, you mean you couldn't open your mouth to speak?
A. No. I was shocked.
Q. You were not so shocked you couldn't try to bite the police officer. Had you calmed down at that time?
A. No, sir, if I may explain what happened.
Q. I just asked you, were you still shocked, whether you were still shocked.
A. Yes, because I had been sitting down, and the officer came and forcibly—first he asked me to move, and which I did not respond; and he tried to carry me away, straining my arm behind my back, about the point to break it; and at this time I turned around and tried to bite him.
Q. Did you also try to punch him?
A. I don't believe so.

[fol. 413] Q. Then, did you get out of this state of shock and yell, "Fascist cops"?

A. I don't believe so, no.

Q. What do you do for a living, by the way?

A. I am a secretary.

Q. A secretary?

A. Yes.

Miss Dembitz: The witness has already testified about her occupation.

Mr. Metzger: Not on cross-examination she hasn't.

Miss Dembitz: I don't believe any further questions about her occupation are relevant or material. The routine question of "What is your occupation?" was already answered, and nothing else on the subject is relevant.

The Court: Is that an objection?

Miss Dembitz: That is an objection.

The Court: The objection is overruled.

Mr. Metzger: I have no futher questions.

[fol. 414] The Court: You may step down.

Miss Johnson: I just have one question, Your Honor.

By Miss Johnson:

Q. You testified—there was some cross-examination with regard to the reason you were listed as Jane Doe on the Complaint; will you explain that?

A. Yes, my arresting officer took the liberty of calling me several—

Mr. Metzger: I object to this, Your Honor, and ask that the characterization be stricken.

The Court: Well, strike out the characterization; that is, "He took the liberty." That is not the question that your counsel is asking.

Q. Explain how it came to be you were listed as Jane Doe on the Complaint.

A. The arresting officer did not ask for my name before he gave me several names, including, "sweetheart, baby," and "Jane Doe."

Q. When he asked you what your name was, did you tell [fol. 415] him your name?

A. I gave him my name, after which he persisted in calling me Jane Doe.

Q. Did you know you were being listed on the police record as Jane Doe?

A. No, I did not.

Q. Now, you say you sat down on the steps. Can you point out on the Defendant's Exhibit where that was?

Mr. Metzger: That is People's One, counsel.

Miss Johnson: I am sorry. I don't mean to confuse the People with the Defendants.

A. I believe it was right here.

Q. That is on the west side of the enclosure of the Father Duffy Square statue. Now, I would like to ask—

Miss Johnson: I would like to ask the Court to take judicial notice of the fact that people are sitting on the steps in this picture; and that it is an usual place for people to sit down.

Mr. Metzger: I object to that.

The Court: The Court refuses to do so, an exception to [fol. 416] the defendants.

Q. When—do you recall hearing the officer tell you to get off the steps?

A. Yes, I do.

Q. And what did you do at that time?

A. Nothing.

Q. How long did you remain there after the officer told you to move off the steps?

A. Probably about ten seconds.

Q. And then what happened?

A. Then the officer forcibly pulled me off the steps.

Q. And you didn't sit back down again, did you? You stayed in a standing position?

Mr. Metzger: I object to the leading question.

The Court: Objection sustained. Tell me, did you sit down because you were tired?

The Witness: No, sir.

The Court: Why did you sit down?

The Witness: I must say, it is difficult to explain. I was [fol. 417] depressed. I was upset.

The Court: Well, did you sit down as a protest?

The Witness: I don't believe so, at the time, Your Honor.

The Court: Well, Mr. Kunis had also placed himself in a sitting position; is that right?

The Witness: Yes.

The Court: Then you saw the police eventually haul him off?

The Witness: Yes, sir.

The Court: At that point you sat down?

The Witness: Yes, Your Honor.

The Court: What was your purpose in your sitting down?

The Witness: At that point I was so upset that I didn't want to leave the Square. At the same time, I didn't feel I could stand any longer; and I sat down.

The Court: Was it in the form of a protest as to the [fol. 418] police action in arresting Mr. Kunis?

The Witness: I don't believe that is what I had in mind at the time.

The Court: All right.

Miss Johnson: I have no further questions.

Mr. Metzger: No further questions.

The Court: You may step down.

Miss Johnson: Will you step down, Miss Chadwick.

The Defense will call the Defendant Arthur Kunis.

Bridge Officer: Kunis, Step over here, sir. Raise your right hand and face the judge.

ARTHUR KUNIS, was called as a witness on behalf of the Defendants, and after having first been duly sworn by the Court, testified as follows:

Bridge Officer: Be seated. Name, address, and occupation.

The Witness: Arthur Sterns Kunis. I Live at 441 East 12th Street. I am a sculptor, carpenter, woodworker, and puppeteer.

[fol. 419] Direct examination.

By Miss Johnson:

Q. Mr. Kunis, were you on the Duffy Square area on Saturday afternoon, August 8?

A. Yes, I was.

Q. And at that time were you arrested by the police?

A. Yes, I was.

Q. You heard the testimony here, Mr. Kunis, to the effect that you had lain down, or sat down?

A. Yes.

Q. On the Square or on the street? Were you lying down or sitting down?

A. Yes, I was.

Q. And I show you here Defendant's Exhibit 1—People's Exhibit 1, which is an aerial view of—

The Court: Is this an aerial view?

Mr. Metzger: Your Honor, I can state it is not an aerial view.

The Court: I didn't think so, but you keep referring to it as an aerial view.

Mr. Metzger: It is from the top of the Horn and Hardart.

[fol. 420] Miss Johnson: That is aerial.

Q. Will you point with your finger exactly where you were when you sat down or lay down?

A. First—

The Court: So we have the record clear, there are two questions in one; you were sitting down or lying down? Which was it? What were you doing?

Q. What were you doing?
A. First I sat down.
Q. Well, before the police came to arrest you, at the time the police came to arrest you, were you sitting, or were you lying down?
A. I was sitting.
Q. Where were you sitting?
A. To the best of my recollection, because of all the confusion, I think it was somewhere in the vicinity of this flagpole, on the west side of Duffy Square.

Miss Johnson: Indicating the southwest corner of the square, of the enclosure.

A. Somewhere between here and the enclosure.
[fol. 421] Q. Somewhere southwest of the steps, of the enclosure of the Father Duffy Statue, between the steps and the flagpole that is on the Broadway side?
A. That is correct.
Q. Mr. Kunis, you said, I believe you said, you were a puppeteer. Are you part of the crowd—of the puppeteer group of Mr. Eckhardt?
A. I am a member of the Bread and Puppet Museum.
Q. Are you known by any other name, other than Arthur Kunis?
A. Yes, I have the nickname, "Beany."
Q. Beany? Now, will you tell us just exactly what happened at the time you were placed under arrest?
A. There were horses—I have no idea where they came from—turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people. And I was—and I'd never seen anything like that before.

Mr. Metzger: I ask that that be stricken.
The Court: Yes, strike out that part of the answer.

Q. Then, what did you do?

[fol. 422] A. Upon seeing what was going on, I had no other recourse but to sit down and refuse to cooperate with the people inflicting what I saw upon the crowd.

Q. Are you a member of the May 2nd Committee?

A. I am a member of no group other than the Bread and Puppet Museum. I have no political affiliations.

Miss Johnson: I have no further questions.

Cross examination.

By Mr. Metzger:

Q. Mr. Kunis, you never lay down on the middle of the street?

A. No, I did not.

Q. Did you hear the officer testify that he saw you lie down in the middle of the street?

A. Yes, I believe so. Officer Fay's testimony was erroneous.

Q. I see.

Examination.

By the Court:

Q. When your lawyer asked you whether you were sitting down or lying down, I recall your testimony was to the effect that at first you were sitting down.

[fol. 423] A. Yes.

Q. What did you mean by that?

A. Well, my immediate reaction was to sit down; and when the police came to take me I went completely limp and laid down.

Q. So there was a time when you were actually lying down on the street?

A. On the sidewalk.

Q. Or on the sidewalk?

A. Yes, sir.

Q. And what was your purpose in doing that?

A. As I said, before, upon seeing what was happening, I had no recourse—well, I could not cooperate with the police because of their actions.

Q. Was this a form of protest on your part?

A. It was a form of stimulus response, I would imagine.

Mr. Metzger: How about it.

Cross examination (continued).

By Mr. Metzger:

Q. Stimulus response, is that what happens to the [fol. 424] puppets? All right. Withdrawn. Did you hold yourself stiff like a beanpole?

A. (no answer)

Q. Excuse me. Did you hear the reporter from the New York Times testify yesterday?

A. Yes, I did.

Q. Well, would you say that you were the individual that he was describing in the stiff fashion, that had to be put into the police car?

A. Yes.

Q. That was you?

A. Yes.

Q. Did you have some reason for holding yourself stiff like that, or was that also a stimulus response?

A. I was not holding myself stiff. I was being carried with my front to the ground and my back—well, due to the way the spinal column is constructed, it appears to be stiff when there is no support in the middle and you are being carried by either extremity.

Q. Had you seen that before?

A. Pardon me?

Q. Withdrawn. Were you resisting this arrest? Was [fol. 425] that your idea?

Miss Dembitz: I object, Your Honor.

A. My idea was not to cooperate.

The Court: The objection is overruled.

A. My intent was not to cooperate; I could not cooperate.

Q. That is the same thing, in other words.

Miss Dembitz: I object to the District Attorney's characterization of this testimony.

The Court: The objection is overruled.

Q. Sir?

A. Morally I couldn't bring myself to cooperate with the police.

Q. Well, I am not asking you for your motive, but what you were trying to do. You may think you had a good reason. We are not going into that. That is not the issue right now. The issue right now is—and you are sworn to tell the truth—just what happened. What did you do.

Miss Johnson: I object, Your Honor. The question has [fol. 426] already been answered on direct examination and cross.

The Court: The objection is sustained. It isn't a question; it is a speech. Next question.

Q. What did you do? What was your intent at that moment?

A. I already answered that question.

Miss Johnson: I object. Objection. It calls for an operation of the mind.

The Court: Objection overruled.

A. I already answered that question.

The Court: Well, answer it again. It is not up to you to determine whether the question is proper. That is why I am here.

Miss Dembitz: Will you repeat the question?

The Court: You are directed to answer the question.

Miss Dembitz: May I ask that the question be repeated?

The Court: His answer was, "I have already answered [fol. 427] the question."

Miss Dembitz: May I ask that the question be repeated?

The Court: Yes, repeat the question. (to the reporter) Maybe you can save time by repeating the question.

Q. What was your intent, at that time, when you were holding yourself limp?

A. Morally I could not bring myself to cooperate with the police.

Q. Now you are telling us the reason why you did something.

Miss Dembitz: Your Honor.

A. That was my motivation, my intent.

Miss Dembitz: Just a moment. I would like to object.

The Court: We can't have six people talking at one time. Do you object to the question?

Miss Dembitz: I object to the question on the ground that it has been answered three times. The question is, [fol. 428] "What is your intent?" Mr. Kunis is stating his intent, and the District Attorney continues to object to his statement as to what was his intent; and, therefore, I think any further question is objectionable.

The Court: The objection is overruled.

Q. What did you intend—what consequences did you intend to follow from your actions, holding yourself limp?

Miss Johnson: Objection, Your Honor.

The Court: The objection is sustained.

Q. Your Honor, I am going to repeat my question as to what his intent was. Why he held himself limp.

The Court: You put the question. I will rule on it. I sustained the previous objection as to form.

Q. What was your intent in holding yourself limp at the time you were being arrested?

A. My intent, my motivation—

Q. I didn't ask you for your motivation. You just used two different words.

A. Well, this is a matter of semantic difficulties; and I would appreciate it if you could more clearly define your [fol. 429] question.

Q. Yes, I will. I will. Wasn't your intent in letting yourself go limp to resist the arrest of the officers; and your motivation for that, according—

Miss Johnson: I object to that question.

The Court: Let him finish the question. He has not finished it yet.

Q. —and the motivation for that, according to your own testimony, was that you felt the actions of the officers were morally reprehensible; and because you felt they were morally reprehensible, you let yourself go limp so they would have as much difficulty as possible in arresting you?

Miss Johnson: I object and ask that all this be stricken. The defendant has asked the District Attorney what he means by intent, and the District Attorney is trying to testify as to what he, (indicating), means by intent.

The Court: Objection is sustained.

Q. By intent, Mr. Kunis, I mean what you hoped your actions would accomplish.

[fol. 430] A. I had hoped nothing.

Q. I see.

Examination.

By the Court:

Q. While all this was going on, were you yelling, or screaming, in protest?

A. I was unable to speak.

Q. You said nothing at all?

A. No.

Q. Did you at any time yell out, "Police brutality"?

A. Yes, in the tombs, while being dragged down the stairs.

Q. Where?

A. In the tombs.

Q. In the tombs?
A. Yes.
Q. I am talking about up at Duffy Square.
A. No, no, Your Honor.
Q. Did you call the police fascists?
A. To the best of my recollection, not at Duffy Square.

Cross examination (continued).

By Mr. Metzger:

[fol. 431] Q. Did you lie down at the police station?
A. Yes, I did.

Miss Dembitz: I object and ask that the question and answer be stricken. It is completely outside of the issues of this case.

The Court: The objection is sustained.

Mr. Metzger: May I say that a continuous course of action, while he is not being charged with having done anything at the police station, anything he may have done in the police station may reflect on the prior conduct which is the subject of this inquiry; and I think it would be relevant and material; but I won't pursue that line if Your Honor sees fit.

The Court: I already ruled on it. The objection is sustained.

Miss Johnson: Thank you.

Q. In the police station, were you asked to give your name?
[fol. 432] A. Yes, I was.
Q. What name did you give?
A. Beany the Third.
Q. Beany the Third?
A. That is correct.
Q. When is it you came to actually give your right name, if this is your right name?
A. In Night Court.

Mr. Metzger: No further questions. One last question.

Q. Have you ever been convicted of a crime?
A. No, sir.
Q. In this State or any other state?
A. No.

The Court: All right, you may step down.
Miss Johnson: The Defense would like to call the Defendant Ann Kyllingstad.

ANN KYLLINGSTAD, was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. State your name, address, [fol. 433] and occupation.
The Witness: Ann Kyllingstad, 446 West 55th Street. I am a mother.
Miss Johnson: Can you keep your voice up, please, and speak loudly.

Direct examination.

By Miss Johnson:

Q. Is it Mrs. or Miss?
A. Miss.

Mr. Metzger: What?
The Witness: Miss.

Q. Were you in the Duffy Square area on Saturday afternoon, August the 8th?
A. Yes, I was.
Q. And did there come a time on that afternoon when you were arrested?
A. Yes.
Q. Now, you heard the testimony of the arresting officer

here in the last couple of days that we have been on trial; is that correct?

A. Yes, I heard his testimony.

Q. Did you hear him testify that you hit or slapped a [fol. 434] police officer?

A. I heard him testify that I slapped a police officer.

Q. Did you slap a police officer?

A. I don't believe my actions could have been construed as slapping a police officer.

Q. Well, did you hit or did you touch or what did you do, exactly?

A. Yes, I did strike a police officer, you might say.

Q. Will you please tell us what the circumstances of your striking a police officer were?

A. Yes, I was wearing an arm band. I had been instructed to keep order among the members of our group who were standing next to me. That meant to keep them off the streets and to keep them from blocking pedestrian traffic along the side. At the point where police horses charged into our crowd and began sideling people into telephone poles or lampposts and flagpoles, I moved away to avoid being crushed against a flagpole. I went up to the steps so I could hear what was going on, because there was confusion in the general area. I could not hear what [fol. 435] our leaders were trying to say without moving closer. I also wanted to get away from the police officers. So, I went to the steps. Then I saw Mr. Laub being arrested and shoved into a waiting taxicab. I went up and I said to the man who was standing with his back to me, "Let him go," meaning to tell him—I am not sure whether I did or not, but I think that I did tell him that this man was our leader. He was trying to keep order here.

Mr. Metzger: Well, Your Honor.

A. (continued) He was the one who could, if anybody, communicate to us the orders, if anyone could, the orders of the police department. I said, "Let him go."

Mr. Metzger: Will you stop for a second.

The Court: Yes, go ahead.

Mr. Metzger: Your Honor, the objection is as to this whole answer to this extent, which begins with what she intended to tell him by saying, "Stop. Let him go."

The Witness: I said, I think I did.

The Court: The objection is overruled. You may continue.

[fol. 436] Q. Then, what did you do?

A. Well, naturally, the man was not listening to me, so I went up and I went like this on his back. I struck him on the back, and I said, "Let him go." I proceeded to say, "We have a right to be here, and you are certainly not going to get us to move if you arrest the person who is telling us, who is giving us orders. We are taking orders from him."

Q. Did you hit the officer more than once?

A. No, I did not.

Q. The officer that you hit, is he the officer that arrested you?

A. I doubt it.

Q. Do you know whether or not it is the officer that arrested you?

A. No, I don't know for certain, but I believe that an officer grabbed me from my side; and the man that I was hitting was in front of me—that I had hit once.

Q. I see.

Miss Johnson: I have no further questions, Your Honor.

[fol. 437] Cross examination.

By Mr. Metzger:

Q. Mrs. Kyllingstad, now, what do you do for a living?

A. As I said, I am a mother.

Q. You are a mother?

A. Yes.

Q. Now, how do you support yourself in this occupation?
A. With money.

Miss Dembitz: I object to any further questions as to Miss Kyllingstad's occupation. Apparently the Prosecution attempts to prove his case by—I withdraw that. I object to the Prosecutor continuing this line of questioning.
The Court: Yes. The objection is overruled.

Q. What is your mode of support?
A. Money.
Q. I see. Who gives you the money?
A. My parents.
Q. I see. And you are presently residing with another [fol. 438] defendant here, Mr. Ostrow, in a subletting relationship; is that the idea?

Miss Johnson: Objection.
The Court: Objection overruled.

Q. Do you?
A. Yes.
Q. Do you sublease a section of Mr. Ostrow's apartment?
A. Yes, Mr. Ostrow's testimony is correct.
Q. You testified, Miss Kyllingstad, that you struck the officer from behind, on his back?
A. Yes.
Q. Saying, "Don't arrest him," meaning "Don't arrest Levi Laub"?
A. That is correct.
Q. On People's Exhibit 7, would you say that you had your arm back there in a striking fashion?
A. (none)
Q. Or were you scratching the back of your head or something. Do you recall this incident?
A. No, I don't recall that particular incident.
Q. Did you also strike an officer on the face?
[fol. 439] A. No, I did not.
Q. Well, in any event, no one had said to you—anything to you at the time that you struck the officer on the back and told him not to arrest Levi Laub; is that correct?

A. Several officers approached me and said, "Move on, Miss. If you do not move on you will be arrested."

Q. But you were not arrested. You were still free; and that is all that was said to you?

A. That is right.

Mr. Metzger: No further questions.

Miss Johnson: Just a second.

Redirect examination.

By Miss Johnson:

Q. Do you know the name of the officer that you struck?

A. No, I don't.

Q. Did you have any idea how tall he was or how large a person was he?

A. Well, he was bending over, but he had a pretty broad back. That is all I could tell.

[fol. 440] Q. Can you tell us with your hand what, exactly, your gesture was in striking the officer?

Mr. Metzger: Indicating a clenched fist, pounding.

The Witness: Yes, that way.

Mr. Metzger: That way?

The Witness: Yes.

Q. Did he respond in any way to your hitting? Did he turn around? Did he flinch?

A. No response whatever.

Mr. Metzger: Well, Your Honor, I am going to ask that that be stricken, because there is more than overt responses.

The Witness: That I could observe.

The Court: The objection is overruled.

Miss Johnson: I have no further questions. Do you have any further questions, Mr. Meisner?

Mr. Metzger: (indicating) That, is Mr. Meisner.

The Court: Step down, please.

[fol. 441] Miss Johnson: The Defense will call the Defendant Pierre Meisner.

Bridge Officer: Meisner. Raise your right hand and face the Judge.

PIERRE MEISNER was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Direct examination.

By Miss Johnson:

Bridge Officer: Be seated. State your name, address, and occupation.

The Witness: Pierre Meisner. I live at 235 West 19th Street. I am presently unemployed, and I am a member of Youth Against War and Fascism.

Mr. Metzger: I didn't get his occupation.

The Witness: At the present time I am unemployed.

Mr. Metzger: You are what?

The Witness: Unemployed.

Q. When is the last time you worked, Mr. Meisner?

[fol. 442] A. Roughly, about four or five months ago.

Q. And what were you doing at that time?

A. I was an actuarial analyst.

Q. What is your educational background?

A. I graduated from City College last summer with a Bachelor of Arts in mathematics.

The Court: Just a minute. All right. Go right ahead.

Q. Mr. Meisner, were you in the area of Duffy Square on Saturday afternoon, August 8?

A. Yes, I was.

Q. And did there come a time in this afternoon when you were arrested? Did there come a time on this afternoon that you were placed under arrest?

A. Yes, I was.

Q. There has been testimony in this trial that there were a number of people at the meeting in Duffy Square wearing black arm bands. Were you wearing a black arm band?

A. No, I was not.

Q. I show you People's Exhibit 1, which is a view of Duffy Square, and will you please point out where you [fol. 443] were just prior to and at the time you were placed under arrest?

A. Right here, near the steps, more towards the west side of Duffy Square.

Q. The steps to the south of the Father Duffy statue?

A. More towards the west, yes.

Q. Now, I believe there was testimony on the part of your arresting officer, Mr. Meisner, that prior to your arrest you were shouting. Were you—what were you saying, if anything, to the crowd?

A. I was saying, "Let them speak," among others who were saying the same thing.

Q. Were you saying anything else, that you recall?

A. I don't recollect what else.

The Court: Well, did you say in words or in substance, shouting, in a shouting voice, that they did not have to leave; that they had a right to speak; that that was a constitutional right. Did you say that in words or in substance?

The Witness: I may have. I can't be sure.

[fol. 444] Q. Would you say that the volume of your voice was at a screeching or screaming level, or how loud were you talking?

A. Not at my highest volume, but high enough for the possible witnesses or the police to hear it.

Q. Well, would you consider that you were screeching or screaming?

A. Not screeching, I wouldn't say that, no.

Q. Now, were you one of the speakers at this meeting?

A. No, I wasn't.

Q. Prior to the time that the crowd was told to disperse and that the police came on the scene, were you talking or making any noises?

A. Prior?

Q. Prior to the time the police came to disperse the crowd.

A. No, this was during the first speech.

The Court: Will you keep up your voice?

The Witness: This was during the first speech.

[fol. 445] Q. Well, let's get the time sequence. What do you mean by the first speech?

A. That is the speech by Mr. Copeland.

Q. Mr. Copeland's speech was the first speech?

A. Yes.

Q. Mr. Copeland's speech, according to the recording we heard, was—did not last very long; and we have been referring here to the introductory speakers rather than to the speechmakers. I believe Mr. Laub addressed the crowd, and Mr. Luce addressed the crowd, and then Mr. Copeland addressed the crowd; and we have been referring to all these addresses as speeches.

My question is, prior to the time the police came in to disperse the crowd, were you shouting, "Let them speak," or were you making any noise?

A. No, none.

Miss Johnson: I have no further questions.

Cross examination.

By Mr. Metzger:

[fol. 446] Q. You say you might have shouted that people did not have to leave the Square; is that what you said?

A. At which time is that?

Q. At any time.

A. Yes.

Q. Did you ever know the defendant Teahan?

Miss Dembitz: May I interrupt for one moment?

The Court: Yes.

Miss Dembitz: One of the defendants would like to leave the courtroom briefly. Because of your admonition yesterday, I want to call this to your attention.

The Court: Then the Court will declare a short recess.

[Whereupon there was a short recess]

Mr. Metzger: Are you finished?

Miss Johnson: Yes, I am finished.

Q. I think I asked you before, Mr. Meisner, whether you were in the vicinity of Teahan. I don't recall what your answer was.

A. I do not recall whether I was.

[fol. 447] Q. Do you recall what you were wearing?

A. What I was wearing?

Q. Yes.

Miss Johnson: Can you keep your voice up, please?

A. No, I don't remember.

Q. What do you remember about that day?

A. I remember I was there.

Q. Did you ever talk to anybody about what you would testify to here today?

A. I may have, generally, in a general way.

Q. Have you ever been convicted of a crime?

A. No.

Q. Now, did you tell people—withdrawn. Were you asked by an officer to step aside, or to leave the sidewalk; do you recall that?

A. No.

Q. Do you recall refusing to leave the sidewalk?

A. No.

Q. You don't remember what you were wearing, whether you were near Mr. Teahan?

A. I didn't hear that.

[fol. 448] Q. You don't remember what you were wearing; whether you were near Mr. Teahan?

A. No, I don't remember what I was wearing.

Q. All right.

Mr. Metzger: No further questions.

The Court: You may step down.

Miss Johnson: We call the Defendant William Turner.

Bridge Officer: Turner. Raise your right hand.

WILLIAM TURNER was called as a witness on behalf of the Defendants, and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. State your name, address, and occupation.

The Witness: William Turner, 920 East 6th Street. I am a social worker.

Direct examination.

By Miss Johnson:

Q. Mr. Turner, were you in the Duffy Square area on Saturday afternoon, August 8?

A. Yes, I was.

[fol. 449] Q. And what was your purpose in being in that place at that time?

A. My purpose was to join in my sympathy for the issues of the meeting; that is, to end the war in Viet Nam.

Q. Are you a member of any of the organizations that were sponsoring this meeting?

A. No, I am not.

Q. There has been testimony here that a number of people that were at the meeting were wearing arm bands. Were you one of the people wearing an arm band?

A. Yes, I was.

Q. What was the purpose of the arm band?

A. Well, when I arrived at the meeting Mr. Levi Laub approached me and asked me would I help to maintain order, to allow for pedestrian traffic, and to keep people out of the street; and I said, "All right." And he said, "Will you wear this arm band to signify that you are a monitor?" and I accepted it and took a position on the southern end of the Father Duffy Square, on the southeastern side, on the Seventh Avenue side.

Q. I show you People's Exhibit 1, which is a photograph [fol. 450] of the Duffy Square area, can you point here where you were stationed as a monitor?

A. Approximately here.

Miss Johnson: Indicating the south of the subway grating, near to the eastern side of the Square.

A. Yes.

Q. That would be midway between the end of the subway grating and the hedge, the shrubbery that is indicated there; is that correct?

A. That is right.

Q. Now, the People that were—well, strike that. Approximately how many people would you say were present at the meeting before the uniformed officers and the horses arrived on the scene?

A. During the speeches, I would say possibly 100 people, and no more, were in attendance at the meeting.

Q. Now, were there people—was the crowd that assembled down as far as you were standing as a monitor?

A. I was practically at the extreme rear of the crowd; in other words, the crowd almost formed into a triangle itself, except that it was more of a semicircle; and I was [fol. 451] near the back of the crowd. I was not in the middle of the triangle. I was more on the east side.

Q. Now, were you able to hear the speeches that were being made?

A. Yes, I was.

Q. And did you hear the announcement by Mr. Laub that the Captain had asked the crowd to disperse?

A. Yes, but that was following a statement that the meeting was to be a peaceful meeting, and following our constitutional rights to hold a meeting.

Mr. Metzger: I ask that that answer be stricken.
The Court: Yes, strike out the balance of it.
Mr. Metzger: From the word, "following."
The Court: Yes.

Q. From where you were standing you could hear the speeches that were being made and the announcement that the Captain had asked that the meeting be dispersed?

A. Yes, the speakers were elevated on the steps, and the use of the megaphone allowed their voices to project.

[fol. 452] Q. Were you present in the courtroom when the tape recording of the meeting was played?

A. Yes, I was.

Q. There was a point in the tape recording where the crowd was chanting, "Let them speak."

A. Yes.

Q. Now, at that time, what was the crowd doing, at the time this chant was going on?

A. Well, the crowd maintained their positions. There was little movement. And I maintained my position, but the crowd was—seemed to be determined to drown out anything further that was going to be—you know, any further orders or, you know, to express their wish to maintain a meeting.

Q. And then there came a time when the police came into the crowd, the horses came into the crowd?

A. Yes.

Q. Did the chanting continue?

A. Well, the chanting continued for about—no more than a minute and a half, when nothing happened, when the Captain and a few patrolmen who were in a line across the front of the steps left the scene; and, suddenly, the [fol. 453] patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then

began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square.

Q. What did you do at that point?

A. At that point I left my position on the southeast corner, and I went up to the front. I was holding a placard, and I held my placard very high. Then I went up on the steps, and I held the placard up, first on the east side of the Square; and then the horses came after me; and then I sort of did some running around the horses. And I went over to the west side and held my placard up, saying nothing. I don't know if I would be allowed to express what the placard said, because this was my message; in other words, this is what I felt was being said to the people. That is why I was there.

Q. Then there came a time when you were arrested; is that correct?

A. Then there came a time when I was taken in custody.

[fol. 454] Q. And where were you standing at that time?

A. Well, there were several instances of my being moved, allowing myself being moved by my arm, being grabbed and pulled by a police sergeant; and this was on the west side of the Square, right next to the steps. I kept circling around the back of the sergeant, after he moved me, and holding my placard up to the people to see what I was there for.

Finally he pulled me along midway on the west side of the little enclosure there, on the sidewalk, and I don't know what happened. I think I stopped short, did not allow him to pull me any further; and it seemed that about four policemen came and started taking me to the car, to a patrol car which was—which was parked approximately where this second—

Q. Wait a minute. Let's get the location here for the record. Where were you when the officers took you into custody?

A. I was about midway up the street, up the western sidewalk from the enclosed area.

Miss Johnson: Indicating about a mid-point between the southern and northern steps of the Father Duffy enclosure, [fol. 455] on the western sidewalk, the sidewalk nearest to Broadway.

A. That is correct.
Q. And then you say the officers escorted you to a—
A. Sort of pulled me there.
Q. To a car?
A. Yes.
Q. I see.

The Court: Keep your voice up.

A. They pulled me over. They pulled and pushed. It is all the same. By the way—

The Court: Don't volunteer any answer.
The Witness: It is continuing what happened. I am not volunteering anything.
The Court: In order that you may answer any questions that you wished asked, I will permit you to confer with her, but let's have the question through your lawyer.
Mr. Metzger: May the record show that the Defense counsel and her client are conferring.
[fol. 456] The Court: It is pursuant to the permission granted by the Court.
Mr. Metzger: All right.
Miss Johnson: Thank you, Your Honor. I have no further questions, Your Honor.

Cross examination.

By Mr. Metzger:

Q. What do you do for a living, Mr. Turner?
A. I told the Court already. I am a social worker.
Q. You work for the City of New York?
A. No, I work for a private agency.
Q. I see. What is the name of that agency?
A. Colony House Settlement, in Brooklyn.

Q. I see. Are you married?

A. Yes, I am.

Q. Now, you say you are not a member of any of the organizations that sponsored this demonstration; is that correct?

A. That's correct.

Q. Are you friendly or associated with any of the people in this organization or organizations?

[fol. 457] A. [No response]

Q. Well, let me ask you this.

Miss Dembitz: I object to the form of the question, Your Honor.

The Court: The objection is sustained.

A. How can I—

Q. Did you come to the meeting in response to a notice?

A. I may have seen a leaflet which was distributed, or I may have read an ad in a newspaper. I am not certain.

Q. So no one specifically asked you to come?

A. No.

Q. Then you came upon the scene and—basically to listen to the speeches; is that right?

A. To add my presence to the others who were listening to the speeches, yes.

Q. Did you want to hear the speeches, or did you just want to demonstrate?

A. I wanted to hear the speeches. I couldn't hear them if I was not present.

[fol. 458] Q. Had you thought about the Viet Nam situation prior to that date?

Miss Dembitz: I object to that, Your Honor.

The Court: Objection overruled.

A. Yes, I had thought about the Viet Nam situation.

Q. Well, in any event you came either because you saw a leaflet or an ad in the paper?

A. That is correct.

Q. And yet you were appointed to be a monitor; is that right?

A. That is correct.

Q. Do you recall standing in front of some officers, screaming, "Fascist police"?

A. This never occurred.

Q. Never occurred? Do you recall saying, "Leave her alone"?

A. This never occurred.

Q. Did you ever scream anything?

A. I never raised my voice, outside of the chant.

Q. Who gave you the arm band?

A. Mr. Levi Laub.

[fol. 459] Q. Now, did you know him prior to that day?

A. Yes.

Q. Did you perform your function well, that of a monitor?

A. Pardon me?

Miss Johnson: Objection, Your Honor.

Q. Well, did you keep all the people out of the street and on the sidewalk?

A. During the peaceful meeting, yes.

Q. I didn't ask you whether during the peaceful meeting you kept them off the street and the sidewalk, did I?

A. You didn't ask me anything, specifically.

Q. I asked you whether you kept the people off the streets and sidewalks.

Miss Dembitz: Your Honor, I can't understand the District Attorney's question; so I doubt if the witness can.

A. There is no time involved. I am sorry.

The Court: The objection is overruled, if it is an objection.

You say you were not a member of this Movement; is [fol. 460] that correct?

The Witness: That's correct.

The Court: And you were merely going up there as an observer, to hear these speakers?

The Witness: That is correct.

The Court: Can you tell us how it happened that you were selected to be a monitor?

The Witness: Yes, yes.

The Court: Why?

The Witness: Well, Mr. Laub and I had met sometime ago at City College; and he knew me from City College.

The Court: Well, had you prior to this occasion discussed with him the purpose of this meeting?

The Witness: No.

The Court: Did he know you were sympathetic to the goals that they were trying to achieve?

The Witness: He may have thought that I was respon-
[fol. 461] sible, I don't know, for the function I was asked to perform. I don't know, but I thought it was a worthy function; so I took it.

The Court: All right.

Q. Did you have that arm band the day before the 8th, at another location?

A. I already testified that they were distributed at the meeting.

Mr. Metzger: I am going to ask the Court to direct the witness to answer the questions without lecturing me.

The Court: Yes, don't tell us what you already testified to when you are asked a question. Answer it. If there is an objection the Court will rule on it.

A. I did not have the arm band before I arrived at the meeting.

Q. Wasn't the purpose of that arm band to represent a mourning of some kind?

A. Definitely not.

Q. And you say you don't recall screaming to the police,
[fol. 462] "Fascist police," and "Leave her alone," and running back and forth on the sidewalk, saying the police could not break up the demonstration? You were quiet during this time?

A. I was quiet.

Q. And you moved when the police told you to move?

A. I moved and reestablished myself, my position.

Q. And how many times did you move and reestablished your position?

A. Several times.

Q. Several times?

A. That's right.

Q. I see, and where was the position you were reestablishing, most of the time?

A. Some place on the steps of the enclosure.

Q. And, yet, all during this period of time that you were being moved and reestablishing yourself you did not yell out anything at all?

A. Definitely not.

Q. You were nice and quiet?

A. Yes.

Q. How many demonstrators would you say there were [fol. 463] on the Square?

A. Approximately 100, perhaps less.

Q. Could there have been more?

A. Not in my estimation.

Q. All right.

The Court: When the Captain ordered you to disperse, did you leave the scene?

The Witness: No, I didn't.

The Court: You felt, as I understand it, that the police had no right to tell you to disperse?

The Witness: Only in the situation, sir.

The Court: On this particular day?

The Witness: On this particular day, at this particular place.

The Court: And instead of leaving you reestablished your position as a monitor?

The Witness: No, sir.

The Court: What did you do?

The Witness: When the crowd in the center was dispersed, I moved up to the front.

[fol. 464] The Court: And raised your placard on high?
The Witness: And I raised my placard on high.
The Court: You did not move?
The Witness: That is correct.
The Court: At that time, did you say in words or in substance that the police were restraining you from performing a constitutional right?
The Witness: I said nothing.
The Court: Nothing at all?
The Witness: I said nothing.
The Court: Do you want to tell us what was on this placard?
The Witness: Yes.
The Court: What was on the placard?
The Witness: The placard said, quote, "Fight the KKK, not the Vietnamese."
The Court: Did you prepare that placard?
The Witness: No, I didn't; but I'd liked to.
[fol. 465] The Court: Where did you get it?
The Witness: It was from a box of placards which were brought to the steps before the meeting began.
The Court: All right.
The Witness: I don't know who gave it to me.

Q. Did you see a station wagon with Vermont license plates, with a large stack of placards in it?
A. No, I didn't.
Q. Did you get your placard from an automobile?
A. No, I didn't.
Q. Where do you live?
A. 920 East 6th Street.
Q. East what?
A. East 6th Street.
Q. Here in Manhattan?
A. Yes.
Q. Do you live there all your life?
A. Yes.

Q. And that is a Saturday, the 8th day of August?
[fol. 466] A. Yes, it was.
Q. And where had you been between, let's say, 8 o'clock in the morning and noon time on that day?

Miss Johnson: Objection, Your Honor.
The Court: Objection overruled.

Q. Where were you during the morning of that day?
A. I was at my brother-in-law's house.
Q. Where is that?
A. In Newark, New Jersey.
Q. And did you have your wife with you?
A. Yes, I did.
Q. Have you lived at this address with your wife all your life?
A. Yes.
Q. And what time did you leave your mother-in-law's house?

Miss Johnson: Your Honor, I object. I think this is irrelevant, unless the District Attorney is going to establish some relevancy here. I think all this testimony should be stricken.
The Court: Objection overruled.

Q. What time did you leave your mother-in-law's house?
[fol. 467] A. Approximately 3 o'clock.
Q. And your intention at the time you left your mother-in-law's house was to proceed as directly as possible to Duffy Square?
A. Correct.
Q. And then you arrived at about 4 o'clock?
A. Just about exactly four o'clock. The meeting didn't begin until about five after.
Q. And you were not a member of this organization or any other organizations sponsoring this meeting?
A. No.
Q. You may have seen a leaflet or an ad in the newspaper, and as a result of that you left Newark, New Jersey,

while visiting your mother-in-law with your wife, and came to Duffy Square; is that right?

A. Exactly.

Q. Have you ever been convicted of a crime?

A. No, sir.

Q. Have you ever been confined to a mental institution?

A. No, sir.

Q. Have you ever been treated for a mental illness?

[fol. 468] A. No.

Q. Have you ever been convicted of an offense involving moral turpitude?

A. No, sir.

[fol. 472] BERNARD LEFKOWITZ was called as a witness on behalf of the People; and after having first been duly sworn, testified as follows:

Bridge Officer: Be seated. Give your name, address, and occupation.

The Witness: Bernard Lefkowitz, 220 East 26th Street. Reporter.

Direct examination.

By Mr. Metzger:

Q. Mr. Lefkowitz, by what paper are you employed?

A. New York Post.

Q. Now, Mr. Lefkowitz, after the 8th of August, 1964, did you have occasion to interview a Mr. Levi Laub?

A. I did.

[fol. 473] Q. Do you remember what day this was on, approximately? Or within what week it was?

A. It was after the 8th, and, I think, before the 13th, the week of the 8th.

Q. All right, and do you recall where the interview took place?

A. Yes, it was at a restaurant at Greenwich Village.

Q. Will you tell the Court in substance, to the best of your recollection, the questions that you put to Mr. Laub and the responses that he made to you?

Miss Dembitz: We object to any questioning along this line, as pure hearsay, under the same ruling that Your Honor made with respect to the conversation that we attempted to question Mr. Leliveld on his examination yesterday, which was excluded from the evidence.

Mr. Metzger: Your Honor, this is offered under the well-known and long established exception of the hearsay rule: admission against interest, or confession.

The Court: The objection is overruled.

Q. Will you tell us then the substance, if you can recall [fol. 474] the words give us the exact words, or otherwise the substance.

A. Well, substantially, I asked him questions about the history of the organization that had participated in the demonstration the previous week, the people who were involved, and what their future plans were.

Miss Johnson: Your Honor, this has nothing to do with admitting against interest.

The Court: The objection is sustained.

Q. Did you ask Mr. Laub, specifically, about any of the motivations that he had?

Mr. Lynn: Objection to the leading of the witness.

Mr. Metzger: Let me finish the question, please.

Q. For organizing this demonstration?

Miss Johnson: Objection, Your Honor.

The Court: Objection sustained.

Q. Did you ask Mr. Laub the purpose of the demonstration?

A. Yes.

Q. Will you tell us his complete answer?

[fol. 475] A. Well, I would rather read it from a copy of the article, to be as precise as possible, because my recollection is not that fresh.

Miss Johnson: I object.

The Court: You can't read it, but—the article—but you can look at the article if it would help you refresh your recollection.

The Witness: Fine.

The Court: Take your time and read it to yourself; then, if it refreshes your recollection, you may testify as to your refreshed memory.

Miss Johnson: Your Honor, I don't know what he is refreshing his recollection with? What article is it? Who wrote it? When was it written?

The Court: I think the testimony is that he wrote the article.

Miss Johnson: He didn't say that.

The Court: He said that.

Miss Dembitz: Your Honor, I think we are entitled to know how soon after the events this article was written; [fol. 476] if it was edited by anyone; if it is the exact words that Mr. Lefkowitz wrote; if in effect he took notes in the interview; if this is a transcription of those notes; and, in other words, we think we should have this examination of the memorandum, or the report, before the witness testifies.

The Court: You may, when you turn comes. You will have a full opportunity, on cross-examination, to do that.

A. As well as I remember, one aspect of his answer was that the organization which he described as the May 2nd Movement would probably grow faster as a result of holding Times Square demonstrations, because the appearance of the group would be attractive to those who believed that organizations were being harassed by the Police Department; and that the presence of policemen on horseback, riders riding in a crowd would attract membership, rather than ideals or opinions of groups; and that is one aspect of this question.

Q. Did he mention anything about resistance to the police, in this context?

[fol. 477] Miss Johnson: Objection, on the ground it is leading, Your Honor.

The Court: Objection overruled.

A. Yes, he mentioned, I am almost quite sure, although I do not believe it was used in the article, that the group tried in almost every case to avoid violence, or to avoid direct confrontation with the Police Department.

Q. Is this a photocopy of the article with your by-line on it which was in the New York Post?

A. Yes, it is.

Q. I notice here a certain quotation mark. I am pointing to it.

A. Yes.

Q. Do you recall that?

Miss Johnson: I object to any reference to this article. The article is not in evidence, and the quotations in the article have nothing to do with the witness' testimony.

The Court: The Court is not permitting the article, but the court will permit the witness to look at the article if it [fol. 478] helps refresh his recollection and then to testify after he has refreshed his recollection, not from the article itself.

Does that help refresh your recollection?

The Witness: Yes, it does.

Q. What is the best recollection you have of that particular statement made by Mr. Laub?

A. That was almost exactly as he said it.

Q. Will you tell us what the statement was?

A. Well, the statement was that "for many people our resistance to the police may be the most attractive part of the organization." And that the organization would grow or increase faster by holding demonstrations than it might by the exposition of ideas.

Mr. Metzger: All right, your witness.

Mr. Lynn: May I cross-examine him first? I am leaving now, and I represent Copeland.

Miss Dembitz: I don't think it reflects on the Administrative Code violation.

Mr. Metzger: Let me make this clear. Your Honor, this testimony is adduced and brought out only with respect [fol. 479] to the charge of Disorderly Conduct, and not with respect to the Administrative Code Violations.

Mr. Lynn: If the Court please, may I say that this witness has testified to a conversation with Levi Laub as to Levi Laub's actions. The action that Levi Laub took was to have a megaphone and participate in the demonstration. I want to cross-examine this witness on what was the conversation he actually had with Levi Laub which actually had to do with the use of the sound megaphone. So, I think it would be very much against due process, and a derogation of my clients rights if I am not permitted to cross-examine him about a conversation he had with the very defendant that I am defending.

The Court: I will certainly permit you at the proper time to cross-examine the witness. But first Miss Dembitz may cross-examine. She is counsel number one with reference to the Disorderly Conduct charge; and the other two charges come after.

[fol. 480] Mr. Lynn: I have no disagreement with Mrs. Dembitz' preceding me. I just didn't want to be shut out altogether.

The Court: You are not going to be shut out.

Have you got counsel's name for the record.

Court Reporter: Yes, Your Honor, I have.

The Court: Oh, you have? All right it is your turn; and, Miss Dembitz, you may be seated.

By Miss Dembitz:

Q. Mr. Lefkowitz, my only purpose was to clarify the testimony a bit. Now, as I understand it, you testified that

you had this interview with Mr. Laub subsequent to the meeting of August 8?

A. The demonstration of August 8.

Q. Is that correct?

A. Yes.

Q. Subsequent to the Duffy Square meeting of August 8, about which the case is concerned. You had the interview subsequent to that?

A. Yes.

[fol. 481] Q. So that when Mr. Laub was speaking to you about the fact of the horses and the fact that in his opinion this attracted attention to the Movement, he was describing to you the events that had taken place on August 8, prior to your interview with him; is that correct?

Mr. Metzger: Well, Your Honor, I am going to object to that as calling for a conclusion; and it is, I think, improper and not within the knowledge of this witness. That is the operation of a person's mind; that is to say, what he had in mind when he made certain statements. I think that inference is for the Court to draw, and not for the witness.

The Court: The objection is sustained.

Q. Mr. Lefkowitz, you refreshed your recollection of this interview, and you tried to recall everything that was said between you and Mr. Laub, had you not?

A. In the space of about ten minutes, yes.

Q. Prior to the statement that you quoted, did you review with Mr. Laub and did Mr. Laub review with you the fact that an order was issued by the police to disperse this meeting; and did he discuss with you the fact that a group of policemen on foot as well as on horseback had been [fol. 482] brought into the Square to disperse the meeting?

A. Yes, but not in detail.

Q. Did Mr. Laub describe to you, before the statements that you quoted, the fact that he and other members of this group believed they had a constitutional right to remain there and to continue the meeting?

A. Yes.

Q. Did Mr. Laub indicate to you that they did not obey the police order to disperse for this reason; that is, the reason that they believed they had a right to hold a meeting?

A. I would assume so. I don't know if he directly said that, but that was the implication of his remarks.

Cross examination.

By Mr. Lynn:

Q. Now, Mr. Lefkowitz, were you assigned to this matter before you went to see Mr. Laub? Were you assigned to this demonstration?

A. To the demonstration?

Q. Yes.

A. No, sir.

[fol. 483] Q. In other words, you were not present when the demonstration was held on August 8?

A. No, sir.

Q. When were you first assigned to follow up on that?

A. Sometime next week. I would say, Tuesday or Wednesday of the next week.

Q. Now, when you were assigned to that, were you notified by any source, of the police commissioner's ban on demonstrations on Times Square?

Mr. Metzger: Your Honor, this is objected to, not proper cross-examination. He only testified as to a conversation with Levi Laub at a certain time.

The Court: Objection sustained.

Q. Now, when you talked with Mr. Laub, did you interview anyone in the police department prior to your examination of Mr. Laub, as a preparation for your examination of Mr. Laub?

A. No.

Mr. Metzger: Objected to. All right, withdrawn.

[fol. 484] Q. When you were talking with Mr. Laub, did the police commissioner's ban come up in your conversation?

Mr. Metzger: Objected to as assuming a state of facts not testified to, not in existence.

Mr. Lynn: He testified already about a police order.

The Court: Objection overruled.

Mr. Metzger: Your Honor, the form of the question is, did the ban come up in the conversation. I think that is assuming that there has been testimony that there was such a ban, so to speak; and it is to that form that I am objecting to.

The Court: I will take it.

Q. Will you answer the question?

A. Yes, the discussion of the ban came up.

Q. And what did Mr. Laub say to you, if you remember, about the police commissioner's ban on demonstrations in Times Square?

A. Well, just generally, he said that there was—that [fol. 485] there had been a ban on demonstrations in Times Square for some time that was, I believe—necessitated—oh, the Viet Nam crisis or before that, and it had continued until now; that he believed there was no crisis at the present time, and there was no need for the ban; and it was not serving any useful purpose.

Q. And what was your understanding, that because he considered this ban unconstitutional he was going to ignore it?

A. Partly, and partly as an aid to increase the attractiveness of the organization.

Mr. Lynn: That's all.

The Court: You may step down. Thank you.

The Witness: Thank you.

Mr. Metzger: That is, of course, the People's case.

The Court: People rest?

Mr. Metzger: The People do.

Mr. Lynn: Defendants Laub and Copeland rest.

[fol. 486] The Court: You mean on the two charges—

Mr. Lynn: On the Administrative Code.

The Court: On the violation of the Administrative Code?

Mr. Lynn: Yes.

The Court: Miss Dembitz, how about the defendants you represent?

Miss Dembitz: Pardon me?

The Court: How about the defendants you represent?

Miss Dembitz: Yes, the defendants rest.

The Court: They all rest?

Miss Dembitz: Yes.

The Court: So that both sides are resting?

Miss Johnson: Correct.

The Court: Now I will hear motions.

Miss Johnson: Do you want the defendants to rise?

The Court: No.

[fol. 487] Miss Johnson: Well, on behalf of all the defendants, on the charge of Disorderly Conduct, the defendants move to dismiss at the end of the entire case on the ground the People have failed to establish their guilt beyond a reasonable doubt; and, in connection with that motion, we have argument to make.

The Court: All right, I am prepared to hear it.

Miss Dembitz: Further, Your Honor, we move to dismiss the case on the basis that the evidence does not establish a violation of Section 722, and on the basis that a conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech and assembly and due process of law.

Now, Your Honor, may I address myself to this; and I will impose on Your Honor for perhaps a little longer than argument in these cases generally takes, because there are tremendously important principles involved in this case. [fol. 488] In fact, this case has arisen because of the police disregard of what are the most fundamental principles on

which our Government is based. And, although this is only a charge of Disorderly Conduct that is involved here, it is in just this type of case that the principles of free speech for the protection of all of us have been evolved.

Now, Your Honor has heard the testimony, and it is uncontradicted testimony, that a meeting was being held in Duffy Square by a group of young people who were interested in opposing, and arousing, public sentiment against extension, mainly against extension, of American participation in the war in Viet Nam, a subject of great public interest, and a political issue of great concern.

Now, the uncontradicted testimony is that there were several speakers on the steps of Duffy Square; that there was an assembly of people which was estimated by the New York Times reporter at 60, and which has been variously estimated by other witnesses as being somewhat larger. In any event, whatever might have been the size, it was assembled on the grating, the subway grating to the south of the steps on Duffy Square.

[fol. 489] The testimony of the New York Times reporter was that it was not a large enough assembly to even reach the back of the subway grating; and Your Honor is familiar with the Square and with the picture that has been in evidence here.

The testimony, the uncontradicted testimony, the virtually uncontradicted testimony, is that the meeting was initially peaceful and orderly; indeed, the recording introduced by the Prosecution, I believe, indicated that it was a peaceful and orderly meeting.

Speeches were being made to the extent that there was a slight undercurrent. It was not of a ruckus, belligerent, and violent nature; but, at the most, there was a slight rumble.

Now, there is a conflict of testimony as to the reason given by Captain McCallister for ordering the meeting to disperse. The reporter from the Times, Mr. Leliveld, whom I believe Your Honor, and all of us, would agree

had no interest in this case, whatsoever, except to be an accurate and honest witness, testified that he was standing next to Captain McCallister; and that Captain McCallister [fol. 490] merely said, "You do not have permission to have this meeting," or words to that effect.

The Special Services officer, Baher, who did not state, as far as I recall how close he was standing to Captain McCallister, stated that the Captain made some remark with respect to vehicular traffic, and that that was the reason that the meeting could not be held.

Mr. Leliveld's testimony, incidentally, was supported by that of some of the other witnesses for the Defense. In any event, whatever might have been Captain McCallister's statement on the subject, there is absolutely no testimony whatsoever in this record that there was any impediment to vehicular traffic that could possibly be considered substantial.

Officer Baher, who was unable to recall how many lanes of traffic there were on Seventh Avenue or Broadway, the most that he testified to was that he saw traffic veer. That was his exact word.

There was also a semblance of testimony from officer Baher with respect to a few pedestrians. He testified that one or more pedestrians said to him, in effect, these words: [fol. 491] "What are these beatniks doing here?" I would say, Your Honor, that officer Baher's reply to that should have been: "In the United States people have a right to assemble and speak, and just because their political views, whether they are beatniks, regardless of whether they are millionaires or paupers, or regardless of their standing in society—"

Well, be that as it may, the total of Officer Baher's testimony did not show that there was any substantial interruption or inconvenience of any sort either to vehicles or to pedestrians at the outset of this meeting; with the exception of one or two people whom I will take up at the end of the argument, the arresting officers testified that all the

defendants, themselves, were on the Square at the time of their arrest, and were not on the street.

Now, on these uncontested facts, Your Honor, we submit that the order to disperse this meeting was completely illegal and unconstitutional and had no force or authority of law.

Now, Judge Breitel in the Rockwell case said that the [fol. 492] principles controlling the exercise of free speech are simple. And they are simple, and I will quote what Judge Breitel said in the Rockwell Case, in the First Department decision, which was affirmed by the New York Court of Appeals, and in which certiorari was denied by the Supreme Court.

The opinion said, quote: "There is no power in government under our constitution to exercise prior restrain of the expression of use, unless it is demonstrable on the record that such expression will immediately and irreparably create injury to the public health. If a speaker incites others to immediate unlawful action, he may be punished, and in a proper case stopped, when disorder actually impends."

There was no testimony, whatsoever, in this record, that any disorder was actually impending, or in any way, before the order to disperse was given.

And, now, I am quoting from the final case of the United States Supreme Court: "Overzealous police officials cannot break up otherwise lawful meetings by their fiat that the meeting is unlawful.

[fol. 493] Not to prolong this, since this is established in almost every book of law, I will just cite the Kuhn case (phonetic) of the United States Supreme Court, in which in a disorderly conduct case on the streets of New York, there was a reversal of a conviction, on the basis that a mere speculative fear of disorder did not justify suppression.

Finally, on this phase of the case, I merely want to quote from the New York Court of Appeals decision in the

Carusel case (phonetic) because the situation here is highly similar.

In the Carusel case some individuals were picketing in front of the U. N. gates. They were asked by the police to move across the street. Indeed, the police banned picketing in front of the U. N. gates, on the basis that they feared it may cause disorders, other pickets may gather, the gates may be blocked, and there would be not only considerable inconvenience to pedestrians, but possibly inconvenience and worse to U. N. delegates and others entering.

The Court of Appeals reversed the conviction, saying the evidence did not show a violation of section 722, and [fol. 494] saying, quote: "The courts have indicated that something more than mere inconvenience of pedestrians is required to support a conviction under subdivision 2."

"There is absolutely no showing either that defendants caused any serious annoyance to pedestrians—and I would like to underline serious annoyance—or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction may be predicated, is the arresting officers' simple statement that the defendants were blocking the pedestrians' right of way."

"That evidence we hold to be insufficient." Now, Your Honor, on the basis that the order to disperse this meeting was without authority of law and entirely unconstitutional, the defendants were under no duty whatsoever to obey this order.

I here would like to quote, again, from a decision; and the reason that I am quoting these at some length is because it seems to be it is admissible on almost every part of this case.

This is a recent decision of the United States Supreme [fol. 495] Court, in Edwards vs. South Carolina, in 372, United States. In this case the Court said—may I say, Your Honor, that this was, again, a dis—well, I believe in South Carolina the statute which is similar to our New

York 722 is called breach of the peace statute, rather than a disorderly conduct statute; but it is to the same general purpose and effect; and it is used in the same general manner as section 722.

The Supreme Court said, quote: "Nobody among the crowd, actually, caused or threatened any trouble. No vehicular traffic was prevented from entering or leaving. Although vehicular traffic at a nearby intersection was slowed down somewhat and officers were dispatched to keep traffic moving, bystanders moved on when asked to do so. Police protection was at all times sufficient to meet any foreseeable possibility of disorder. There was no violence or threat of violence on the part of the crowd assembled. The police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the [fol. 496] City Manager described as, quote, 'boisterous, loud, and flamboyant conduct,' which, as its later testimony made clear, consisted of listening to a religious harangue, loudly singing patriotic and religious songs, by stamping their feet and clapping with their hands."

"After 15 minutes had passed, the police arrested the petitioners, and marched them off to jail." Unquote.

This conviction was reversed as a violation of the 14th Amendment.

Now, Your Honor, while this is established law established by the Edwards case, I take a moment to suggest that it must be law. That is, if the law were that people must obey any order that the police gives to move on, this would be, I believe, it is obvious, that this would put the police above the law, above the Constitution, above the courts, and above all other authority. And they would be able by their arbitrary acts, by their mere giving of the order to move on, to break up any meeting that was held in any place.

[fol. 497] So, that I submit that the rule of the Edward's case, which is the rule of the United States Supreme Court, is incontrovertibly necessary. In fact, I don't believe it is necessary for me to continue with that particular point.

Now, the prosecutor has emphasized testimony that some of the defendants used. The expression, "fascist cops," or as the officers themselves said, "fascist cops or something to that effect."

It did not appear from their testimony that they took this Apalachian very seriously. This term was used, to the extent it was used, in the context of the break-up of this meeting, and of the arrest. It is not as the Complaint charges, the cause of the arrest. The Complaint is obviously addressed to the conduct of the entire group, and it is not addressed to the individual Apalachians used by one, or two, or three, or four of the defendants; and any conviction on the basis of this type of statement would be a clear violation of due process, because it is not within the allegations of the charge.

[fol. 498] I would also call Your Honor's attention, as I think Your Honor is well aware, that the circumstances under which this term was used, to the extent that it was used, that at this juncture of the meeting there were, according to Mr. Leliveld's statements, a group of about 20, perhaps 25, people remaining in the Square.

There was at least 12 officers, since there are 12 arresting officers. The testimony is that there were considerably more than 12 officers. There were officers on horseback riding into the center of the Square; as Mr. Leliveld testified: "That was like having a horse in your living room," and Your Honor is aware that this is not a large space for two large horses with policemen sitting on them.

The police had their clubs drawn, and under all the circumstances—I do not want to call the circumstances to the Court's attention in connection with the fact that some of these defendants may have used this term. The mere fact that some of them may have remonstrated with the police,

of course, is no basis for a charge of Disorderly Conduct. [fol. 499] The United States Supreme Court recently said, in the Thompson case, and I quote from 362 United States:

"Arguing with a policeman is no cause—cannot be the basis for a charge of Disorderly Conduct." End quote.

Your Honor, the Prosecution here introduced some evidence as to the regulations of the Park Department. I am not going to address myself to that at length, because it is not within the allegations of the Complaint; indeed, it is contradictory to the allegations of the Complaint, which charge that these defendants were congregating on a public street; and, again, any conviction on the basis of the Park Department Regulations would be a clear violation of due process, because of lack of notice. If the Prosecution goes into this, I would ask the privilege of rebuttal on this. And I would just add at this time that Your Honor will probably recall that I questioned the Park Department's representative as to whether there was any use to which this area on which the assembly was held was put, and he testified that there was no use, except as a subway grating. [fol. 500] So, in any view of the case, the Park Department Regulations are irrelevant to the guilt of the defendants.

Now, I would just conclude by referring to some of the testimony which was given as to particular individuals, with respect to their physical conduct.

Again, at the risk of repetition, I want to say that the Complaint is obviously based on the conduct of the whole group. There is no implication in these charges, whatsoever, that there would be any attempt to prove, or, that is, any charge of, or that there would be any evidence about individual physical acts, as to which testimony has been admitted; and that, therefore, there can be no conviction based on those acts, consistent with due process of law.

Nevertheless, I would like to briefly address myself to what these acts alleged were. There was testimony by a police officer, I believe, that one defendant was sitting or

lying on the Square, and, then, that two other defendants were, I believe, pulling at him.

[fol. 501] This officer's testimony, of all the officers that testified, was—had the least credibility. Either his powers of observation or memory were extremely—I was addressing myself to the testimony of the officer who testified that one of the defendants was lying or sitting on the Square and that two others were tugging at him.

This particular officer, I believe, was not a witness whose credibility could by any stretch of the imagination be considered high, because unfortunately his powers of observation or his recollection were very defective.

This is the officer who, I believed, testified that he had been in this precinct for 12 years and was familiar with this area and recalled, presumably, the events with respect to these defendants, but he could not recall whether or not there was a statue at the south side end of the Square, which is one of the most conspicuous objects on the Square. Furthermore, his testimony as to what directions the police had was in direct contradiction of the testimony of 11 other officers; as opposed to his testimony about these three de-

[fol. 502] fendants, the defendants themselves testified. I will not try to characterize them, because Your Honor heard them. However, I will recall you that none of these defendants had ever any conviction for any crime; that, in fact, they had not appeared in the courtroom before. Nevertheless, the Prosecutor was unable to shake that testimony, their testimony, that they did not engage in the conduct that was alleged by this officer.

There were two other incidents of which the Prosecutor made a good deal. One was the testimony that one of the defendants—I think two of the defendants—lay down in the middle of Broadway and stopped the traffic.

Now, Your Honor will recall that when Mr. Leliveld was questioned about this alleged incident, which was the testimony that these people had lain down in the middle of Broadway and backed up traffic, when Mr. Leliveld was

questioned about this incident, he said he did perhaps remember someone lying down. He didn't know whether it was on the Square or on the street.

Now, I submit, Your Honor, that anything as spectacular [fol. 503] and unusual and completely unprecedented as someone lying on the middle of Broadway could not possibly escape the attention of a newspaper reporter or anybody else.

Another reflection on this piece of testimony, is that there was testimony by one of the Prosecutor's witnesses—I am afraid I don't recall which one—that at the time of the arrest, after the order to disperse was given, after the horses were ridden unto the Square, after people were being chased by the horses off the Square, to some degree, that after taxicabs and prowl cars were being lined up, that at this point or immediately prior to that point a traffic officer was stationed on 47th Street and Broadway to direct traffic. That testimony seems to me inconsistent and to reflect on the credibility of the testimony that these two people stretched themselves out on the middle of Broadway and thereby blocked up the traffic.

These persons who are alleged to have done this, Your Honor, also saw and heard—and I again repeat that there was nothing in their testimony or in their cross-examination to reflect upon their credibility.

[fol. 504] The testimony was that one of the young women —well, hit a policeman on the back, with her hand. Again, this incident seems to me exaggerated, out of any possible significance that it could have had. This is a young woman of medium size and height. She was attempting to speak to the policeman about the dispersal of this meeting, and in the course of that, and no doubt affected by the scene of horses, and policemen, and people being loaded into taxicabs, into prowl cars, chased off the pavement, she, as she herself testified, hit this policeman on the back.

Your Honor, I believe that is the essence of the argument that we want to make on this. I would like to have leave—may I consult with my co-counsel for one moment?

The Court: Yes, go ahead.

Miss Dembitz: Your Honor, there is one more physical act which, again, I repeat, is not covered by the allegations of the Complaint, but which my co-counsel has reminded me of. This related to the matter of one of the defendants and the horses. I believe that that matter of how he hit the [fol. 505] horse once with his bare hand and once with a rolled up piece of placard board has been adequately explained. I think it is obvious he was not attempting to either disable the horse or disable the policeman, but that he was attempting to protect either himself or some other person standing there from being trampled, kicked, and maimed by these police horses.

The only other matter, one matter, that I did not address myself to and which relates to the fundamental issue of freedom of assembly, I want to return to for a moment; and that is the matter of the fact that these speeches that were being given, may have been given in a way so that the assembly could hear them.

The question has been asked a number of times here whether these people were speaking in a loud voice or a soft voice, or how they were addressing the group. On this point I want to again refer to the rulings of the United States Supreme Court on the question of freedom of speech, and I quote from the recent decision in the case of New York Times vs. Sullivan, 376, United States, in which the [fol. 506] Court said, quote: "Debate on public issues should be uninhibited, robust, and wide open. It may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Your Honor, this case is essentially a case of the unjustified break-up of a public assembly held for the discussion of political views.

Mr. Lynn: If Your Honor pleases, on behalf of the two defendants who are accused of violation of Section 435 dash 6 point 0 of the Administrative Code, I only want to add a few words.

I join in, certainly, with everything that Mrs. Dembitz has said about the general principles which we are approaching in this case. In this particular instance these two young men, Levi Laub and Vincent Copeland, were charged with using a battery operated megaphone without a permit. As was brought out by the last witness for the People, on rebuttal, this regulation provides that the police commissioner may make a ruling, upon investigation, that no permit may be granted under certain conditions for this kind of amplification of sound.

[fol. 507] Now, this commissioner's ruling was directly at issue in the use of the megaphone, because it is the position of these defendants that this ban by the commissioner was applied in an unconstitutional manner, in that it applied to this demonstration but it did not apply to other demonstrations; that it would have been of no use—it would have been a vain act to ask for a permit where the commissioner's ruling barred any such possibility of an issuance of a permit in the first instance. There was this police commissioner's ban; and, therefore, it would have been a vain act to apply for a permit. And in order to assert their right to have a public meeting and have the necessary amplification of sound, then they proceeded to use this battery operated megaphone.

As the Supreme Court of the United States has said in a late case, Harrison against the NAACP, "Where the order of the State or the City authority is unconstitutional in its application, it is not necessary for the person who is asserting his constitutional right to go through state procedures or departmental restrictions where there is a clear viola-

[fol. 508] tion of "the First Amendment guarantee as applied to the states by the Fourteenth Amendment. The defendant may assert his right without going through these prior processes."

Therefore, because these two defendants were only operating within their rights of free speech as determined by the highest judicial authority, any charges against them for using this megaphone should be dismissed.

The Court: Do you wish to be heard?

Mr. Metzger: Very shortly, just for a short period of time. Your Honor, just a few comments.

I am sure Your Honor is aware, but I wish to say it again to make it clear, because there have been certain inferences made in this case, that the prosecution charges in this case are not based on anything that these people said. It has nothing to do, whatever, with their contents.

The District Attorney of this County, as indeed most of the law enforcement agencies of this State, are fully aware, and in complete agreement, of all the rulings of the high [fol. 509] courts, of both the state and the Federal government with respect to the various freedoms guaranteed to the various citizens and residents in this country.

Now, the People sought to prove through the testimony of the officers that each individual now charged with this offense by his own individual conduct violated the section of the Penal Law now in question. It was, however, necessary to bring to the Court's attention, as difficult as this task is, and I think the Court will appreciate this, the general conditions that prevailed at the time and place. It is almost impossible, of course, the atmosphere of a courtroom to re-enact through testimony, through the limitations by which testimony is given, the conditions facing the police officers on that afternoon of August 8.

Now, I am not going to go through, Your Honor, the specific testimony with respect to each individual to try to show how that individual himself and through his or her own acts breached this section, although there is ample testimony. In fact, some of the most illuminating testimony came from the defendants mouths themselves.

[fol. 510] With respect to this, however, the inference, in fact, I think, the thrust of the Defense in this case is that this was a peaceful meeting. Along came the police, and they "unconstitutionally" broke up this meeting; and then the license to riot began. Then everything after that was all right.

That, it seemed to me, to be the position of these defendants. Now, it is the People's position, Your Honor, that even if this was true, that if this meeting was entirely peaceful—and there is evidence it was not—that even if it was, that even if the police, the police captain, McCallister, and the inspector were wrong in telling these people to disperse, their conduct from that point on cannot be justified by this alleged error of the captain or the inspector.

I do not mean to imply that the People concede there was any such error, but just assuming this arguendo, this does not give the people the right to run into the street and lie down, to run into the sidewalk, to strike police officers, to scream and to engage in the other activities that were testified to over and over again and substantiated, in fact, [fol. 511] by all Defense witnesses.

Now, there are proper forms, Your Honor, to alleviate a grievance such as that. The Defense has cited to Your Honor the case of Rockwell vs. Morris, I think it is.

This was an Article 78 proceeding, Your Honor, to force the Commissioner of Parks to issue a permit. This is a legitimate way to secure a right which might be capriciously or arbitrarily denied by some law enforcement official.

Even Rockwell did not run out in the street and have a riot. He brought a law suit. But I have been assuming for the purpose of argument that the police were wrong in telling these demonstrators or individuals who were having the discussion or speeches, that they were wrong in stopping this, Your Honor. But this is not the case, Your Honor. In fact, they were not wrong in telling them to stop. In the first place, there is evidence that prior to the police ever coming unto the Square there were demonstrators on the sidewalks, in the streets, and that vehicular traffic and pedestrian traffic was disrupted.

[fol. 512] Now, if the Court finds that that was a fact and resolves that fact according to the People's motion, then, under Finer and under every case that has been decided, the police would have a right to stop the demonstration.

Finer was convicted of 722 up in Syracuse, and his conviction was upheld by the United States Supreme Court on

that very basis, that people who had crowded to listen to Finer—and Finer here is passive. He was talking. He is on a bus. He does not stop. He is just talking, and people listening to him spilled over to the street, and the police had to stop it.

There is a certain boundary between the freedom of speech and, after all, the freedom of the rest of the people that are not listening to the speech to go about their normal course of business.

So, if the Court finds that prior to the captain coming over, that there were people on the sidewalk and on the street, certainly the police officers' conduct in asking these people to stop was justified. Furthermore, and as a second reason as to why they were justified, the People produced evidence that this was a park. The entire area was a park. [fol. 513] Section 21 (a) of the Department of Parks Regulations requires that a permit be obtained before this park is used for such a demonstration. This particular section of the Department of Parks Regulations is specifically upheld in the Rockwell case. In fact, the Court says, speaking of this regulation, that the regulation is valid.

What happened in the Rockwell case is that the Commissioner of Parks, Mr. Morris, wouldn't issue a permit to Rockwell. Period. So, he said, "You have to issue one," and the Court said, "You are right, because the regulations themselves say that the permit must be issued." If the permit is not issued on the spot and at the time requested by the applicant, the department has got to offer the applicant an alternative, and here Commissioner Morris did not do it.

That is why this case was brought on, and eventually Mr. Rockwell got his park.

In this case the testimony of the man from the Department of Parks was that no such application was made and no such permit granted. So, on the second count, the police would have been justified in dispersing this group. But [fol. 514] I don't want to give the impression, Your Honor, that this case stands or falls or that it is terrifically pivotal as to whether or not the police were acting properly in tell-

ing these people to break up this meeting, because whether or not they did act properly on this can have no bearing and cannot justify a wilfully committed crime. This is not the way that one adjusts grievances, and this is the reason why we have courts, Your Honor.

The defendants claim that they are merely seeking to assert their constitutional rights. I think they overlooked a long-established principle of common law and carried in our Constitution itself; that for every right there is an obligation, and that for the right they have to speak, there is a right of the people to maintain peace and order; and, Your Honor, it is my opinion, and I think the evidence in this case substantiates that opinion, that these people were not primarily motivated by the so-called desire for a free market place of ideas; that they were not there for an academic discussion; and that they made not the slightest effort to secure a forum or a place where they could speak [fol. 515] through a legitimate or recognized method.

I think the evidence tends to show that these people were there for the sake of demonstrating. They were there for the sake of resisting the police. This was a sort of excitement they were looking forward to very much. Their continued resistance, their screaming, Your Honor, held after the meeting was broken up, lends support to that theory. In fact, it is completely substantiated in my mind, because when there was no longer any possibility to have any sort of an intelligent exchange of ideas on a legitimate subject, and certainly the war in Viet Nam is a legitimate subject, when that time had gone, then it became apparent that the continued demonstration was for the sake of demonstrating, if it was not that in fact from the very beginning. This is analogous to a situation of resistance of arrest; and every court has held that even when resistance is legitimate there comes a point that if continued beyond that point it is for the purpose of spite and not for resistance, and at that point the resistance becomes unlawful.

The statement by Mr. Laub, that he made to the reporter, [fol. 516] is very significant, understanding the psychology of this situation. He said that for many people resistance

for the police is the most attractive thing. That is really the answer on this case. But strictly on the law, the People sought, and I believe did prove in each individual case, that the 17 defendants, each one individually, without regard of what the others were doing, conducted himself in such a manner as to violate this section; and no matter what noble motivations they may claim, as the Court of Appeals said in the case of Peck vs. Peck, no matter what noble motivations a person may claim does not justify the commission or the intentional commission of a criminal act.

With respect, of course, to the Administrative Code violation, Your Honor, there isn't really anything to say. The Court was, I think, overwhelmed with evidence, as far as the use of these particular devices is concerned, on the tape recorder. That is one of the purposes of the tape recorder. The instrument is here.

Defense witnesses and Prosecution witnesses all testified [fol. 517] to seeing the two defendants use these. The man was here from the precinct. It was stipulated that there was no permit involved.

Just one or two other comments on the statements of Defense counsel. Defense counsel, I quote her, said, "It was not a large space," and she quoted Mr. Leliveld as saying something like horses in your living room. The testimony here is that at a minimum, and that is what Mr. Leliveld said, there were 60 people demonstrating. The police have it up to 200, and many of the defendants say between 100 and 150. So, it could be anything between 200 and 60. We are giving Mr. Leliveld the benefit of the doubt.

In this space it is inconceivable, Your Honor, that under the circumstances these people were not spilling unto the street and blocking up traffic. I only bring this up because Defense counsel has made a point about the smallness of the space, which I think is a sword that cuts both ways.

I would comment on the specific defendant Maher and the horse and Kyllingstad slapping the officer and all that, but I think that by their own testimony they have, so to speak, [fol. 518] hoist their own petard.

Your Honor, the People of the State of New York, the People of the City of New York, are also entitled to the due process of law. Thank you.

Miss Dembitz: Your Honor, may I reply briefly, very briefly. It will only be for three or four minutes.

The Court: Yes.

Miss Dembitz: If I may start at the end, since this sticks in my mind, there is the question of the space; but we don't have to have a lot of semantics about that, because the actual area has the measurement that has been testified to.

When Mr. Leliveld referred to a small space he, of course, was referring to a small space in proportion to two large horses. I recall, perhaps from the First World War, there was a expression "four men," or "Forty men," or "Four horses that a car could hold." In other words, a space that couldn't hold two large police horses could nevertheless very well hold, let us say, 100 or 150 people. I may have the expression wrong.

The Court: You are talking about "Forty and eight."

[fol. 519] Miss Dembitz: "Forty and eight," excuse me. I think that is it.

Now, I don't believe it is entirely relevant, but since the matter has been discussed by the Prosecutor as to whether the purpose of this meeting was to express and arouse public sentiment on this issue, I want to remind Your Honor that there was testimony that approximately 10,000 announcements of this meeting had been distributed; and that people and a number of the witnesses themselves, or the defendants themselves, were people that were unconnected with any organization involved in organizing this meeting; and that their purpose in coming there was to participate in a meeting and to express their sentiments on the public issues that were involved.

The interviewer, this last witness, of course, related to Mr. Laub's statement of the effect of the meeting, after it had been held; and I would certainly concede, and I think Mr. Laub will concede, that the aspect of this meeting which [fol. 520] the way it worked out attracted the greatest

amount of attention was by having police horses and clubs and policemen over the Square.

Now, I would like to refer back to one remark of the Prosecutor's, Your Honor, that you might find in the record, evidence as to the effect on vehicular traffic. I believe this is not a matter on which we even have to refer to a written transcript.

There was, I believe, two witnesses presented by the Prosecution who had been at the meeting from the beginning. Your Honor will be aware, as I was very much aware, that for reasons unknown to me Captain McCallister was not called, nor the officer who was with Captain McCallister, who could have been the best witnesses as to what the conditions were and as to the reason for this order.

In any event, I believe that our memories need no refreshment on the fact that I previously stated, that the only evidence as to vehicular traffic at the time of the meeting itself, before the order to disperse, was given by Officer Baher and was to the effect that he saw the traffic veer. [fol. 521] That was all of the testimony on that point, and I am sure the transcript when it is written will corroborate that.

Now, I would like to refer to two other small points. Mr. Metzger referred to the Finer case which, I admit, I previously referred to myself. I think he left some inferences that this case was analogous to the Finer case. The Finer case, in which the conviction was upheld, related to the fact that some of the crowd spilled over unto the street. I do not believe there is any reliable testimony on this case that the assembly did so; but even if it were, that was not the basis of the Supreme Court's decision, which the Court statement that the lower court recognized that a person holding a street corner meeting can be arrested for, quote, "incitement to riot," and that the order to disperse the meeting in that case, in the Finer case, that the order to disperse the meeting was considered constitutional because it was considered that Finer was inciting to riot, not on the basis of any events after the order to disperse; but that the order

to disperse was upheld as not being a violation of the freedom of speech on the basis that Mr. Finer was, quote, "en-
[fol. 522] gaging in incitement to riot."

Finally, Mr. Metzger suggests that rather than opposing this order and attempting to continue this meeting—that is, rather than opposing the order to move on, and rather than continuing this meeting, that there is some proceeding of some type, some legal procedure that should be brought to test that order; that this would be a more orderly way to proceed.

I submit to Your Honor that there is no way to test an illegal order to move on at a given time and place, other than not moving on, and other than running the risk of arrest, and other than contesting it, as we are contesting it in this court.

I do not want to repeat; so I will not again call your attention to the Edwards case, in which this very issue was passed upon by the Supreme Court; and I also know Your Honor is aware that even in the case of an arrest, if there is an illegal arrest, actual physical resistance to this arrest is legal, as the Court of Appeals held in People vs. Sherry, 307 N. Y., and as was recently reaffirmed by a lower court in
[fol. 523] the 1962 decision, in which the court said, quote, "If defendants' arrests were illegal, it is also clear that they could resist such arrest provided the force used was not more than sufficient to prevent such offense to their persons." In other words, force sufficient to prevent their arrest could be used.

We do not have that case before the Court, but it is an analogous principle involving the principle of opposing an order to move on.

The Court: Anything else?

Mr. Metzger: No.

The Court: Does that complete the motions on behalf of each defendant?

Miss Dembitz: Yes.

The Court: Does it complete argument on behalf of the People?

Mr. Metzger: Yes.

The Court: The Court will first address itself to the first charge; that is, the charge of Disorderly Conduct brought against the defendants William Turner, Albert Maher, Levi Laub, Richard Rhoads, Theodore Ostrow, Joyce Chadwick, [fol. 524] Ellen Shallitt, Arthur Kunis, Bruno Eckhardt, Vincent Copeland, Jeremiah Gelles, Ann Kyllingstad, Pierre Meisner, Fred Jerome, Jeremiah Teahan, Key Martin, and Robert Apter, the motion to dismiss the Complaint as to each of these defendants is denied; and each defendant is found guilty as charged.

With reference to the charge of violating the Administrative Code, with reference to the Defendant Levi Laub the motion to dismiss that complaint is denied. The defendant is found guilty as charged.

With reference to the charge against the defendant Vincent Copeland, which concerns itself with the violation of the Administrative Code, the motion to dismiss is denied, and the defendant is found guilty as charged.

* * * * * * *

[fol. 525]

IN THE CRIMINAL COURT
NEW YORK COUNTY
Docket Nos. 15605-15621

THE PEOPLE OF THE CITY OF NEW YORK,

—against—

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, "Jane Doe" a/k/a JOYCE GARDNER, ELLEN SHALLIT, "John Doe" a/k/a ARTHUR KUNIS, BRUNO ECKHART, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN and ROBERT APTER, Defendants.

NOTICE OF APPEAL TO APPELLATE TERM OF SUPREME COURT, FIRST DEPARTMENT—November 24, 1964

Please Take Notice that the defendants in this action, above named, hereby appeal to the Appellate Term of the Supreme Court, First Department from a final judgment of conviction of the Criminal Court, entered in the office of the Clerk of the Criminal Court, New York County, on the 18th day of Nov., 1964, whereby the said defendants were adjudged guilty of the offense of disorderly conduct (Section 722 (2), (3) and (4) of the Penal Law of the State of New York) with sentences of $25.00 or 5 days for defendants Maher, Laub and Copeland; the other defendants receiving suspended sentences with the addition that defendants Kunis and Kyllingstad be placed on probation.

Dated: New York, New York
November 24, 1964

Nanette Dembitz, Janet Ann Johnson, Attorneys for Defendants, New York Civil Liberties Union, 156 Fifth Avenue, New York, New York 10010, OR 5-5990.

To:

Hon. Frank S. Hogan, District Attorney of New York County, 155 Leonard Street, New York, New York 10013.

Clerk of the Criminal Court, 100 Centre Street, New York, New York.

[fol. 526]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM—FIRST DEPARTMENT

Docket No. .....

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, "Jane Doe" a/k/a JOYCE GARDNER, ELLEN SHALLIT, "John Doe" a/k/a ARTHUR KUNIS, BRUNO ECKHART, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN and ROBERT APTER, Defendants-Appellants.

STATEMENT PURSUANT TO RULE 5531 OF C.P.L.R.
—December 7, 1964

1. The index number of the case below is 15605-15621.

2. The full names of the original parties are: People of the State of New York, plaintiff, and William Turner, Albert Maher, Levi Laub, Richard Rhoads, Theodore Os-

trow, Joyce Chadwick, Ellen Shallit, Arthur Kunis, Bruno Eckardt, Vincent Copeland, Jeremiah Gelles, Ann Kyllingstad, Pierre Meisner, Fred Jerome, Jeremiah Teahan, Key Martin, Robert Apter, defendants. There has been no change of the parties.

3. The action was commenced in the Criminal Court of the City of New York, in the County of New York.

4. The action was commenced on August 8, 1964 when defendants were arrested on a complaint charging them with disorderly conduct.

[fol. 527] 5. Defendants are charged with disorderly conduct in that it is alleged that they congregated and assembled at Duffy Square in New York County, obstructed traffic while carrying placards, used loud and boisterous language, caused a crowd to collect and failed to move on when ordered to do so.

6. The appeal is from a judgment of conviction after trial for violation of Section 722 (2) (3) and (4) of the Penal Law, entered on November 18, 1964.

7. The defendants elect not to use the appendix method.

Nanette Dembitz, Janet Ann Johnson, Attorneys for Defendants-Appellants, 156 Fifth Avenue, New York, New York 10010.

Dated: December 7, 1964

[fol. 528]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM—FIRST DEPARTMENT

Docket No. .....

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

WILLIAM TURNER, et al., Defendants-Appellants.

STATEMENT PURSUANT TO RULE II(2) (c) OF THE RULES OF THE APPELLATE TERM, FIRST DEPARTMENT—December 7, 1964

The defendants were never admitted to bail.

On November 18, 1964 in Criminal Court, Part 2A Defendants Maher, Lamb and Copeland paid fines of $25.00 each; the respective receipt numbers were 15235, 15236 and 15237. The Docket Numbers of the cases were: C15605-C15621. Defendants Rhoads, Ostrow, Shallitt, and Teahan were sentenced to $25 or 5 days; the fines were not paid for the reason that sentences were suspended.

Nanette Dembitz, Janet Ann Johnson, Attorneys for Defendants-Appellants, 156 Fifth Avenue, New York, New York 10010.

Dated: December 7, 1964

[fol. 529]

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM—FIRST DEPARTMENT

Docket No. .....

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, "Jane Doe" a/k/a JOYCE GARDNER, ELLEN SHALLIT, "John Doe" a/k/a ARTHUR KUNIS, BRUNO ECKHART, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN and ROBERT APTER, Defendants-Appellants.

AFFIDAVIT OF NO OPINION

State of New York,
County of New York, ss.:

Nanette Dembitz, being duly sworn, says:

No opinion or memorandum was rendered by the Court below in this case.

Nanette Dembitz.

Sworn to before me this 7th day of December, 1964. Janet Ann Johnson, Notary Public, State of New York, No. 31-7098950, Qual. New York County, Comm. Expires March 30, 1966.

[fol. 530]

APPELLATE TERM, SUPREME COURT

FIRST DEPARTMENT

OPINION

HECHT, J.:

The convictions all spring from a public meeting held by the so-called "May 2nd Movement", an organization formed at Yale University in March, 1964, for the purpose of protesting American involvement in the war in Viet Nam. The meeting was held in Duffy Square, an island located at the intersection of Broadway and Seventh Avenue and bounded by 46th and 47th Streets.

The prosecution's witness, Detective Behr, testified that on August 8, 1964, at approximately 4:00 P. M., the defendant Laub "mounted the steps on the southern end of the statue" located in Duffy Square and proceeded to speak through a "battery-powered megaphone" which provided loud amplification. The witness added:

> "He (Laub) stated that the May 2nd movement had called this meeting and then proceeded to introduce Mr. Philip Luce, whom he stated would be the chairman for this meeting. Mr. Luce began to speak. At this point, representatives of the Police Department, a captain and an inspector, spoke to Mr. Luce, Mr. Laub, Mr. Maher, and, I believe, also Mr. Copeland.
>
> • • • • • • •
>
> "The police captain informed Mr. Laub, Mr. Maher, and Mr. Mopeland [sic], and Mr. Luce, that at the present time the demonstration was interfering with pedestrian and vehicular traffic; that people had to walk into the street to get by.
>
> • • • • • • •

[fol. 531] "That in view of this interference with pedestrian and vehicular traffic, that the meeting would have to be terminated at this location at this time.

"Mr. Laub then took the battery-operated megaphone again and put it up to his mouth and proceeded to speak into it and spoke to the people assembled there. There were approximately two hundred people assembled there. He stated to them that this captain—I believe he stated, 'The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here.'

"Then he informed the people that, in spite of this, they would continue their demonstration and he again gave—I believe he gave the megaphone to Mr. Copeland—no, to Mr. Luce, again. Mr. Luce then continued to speak and introduce Mr. Vincent Copeland. Mr. Copeland spoke into another battery-operated megaphone which he carried. He spoke to the people there, speaking of the crimes of American imperialism against the working people."

The captain again told the four above-named defendants that the demonstration interfered with pedestrian and vehicular traffic and had to be terminated, and again the defendant Laub announced his defiance of this request.

Behr further testified that in the area surrounding the Square there were approximately 4,000 to 5,000 people. Pedestrians "were forced to go into the street to walk around the people assembled * * * for the demonstration" and cars veered sharply right on Broadway and left on Seventh Avenue "to avoid persons who were in the street walking north and south around the demonstration". Some [fol. 532] of the demonstrators, including some defendants, were in the street. There was chanting and shouting ("Let him speak") and drums beating and the defendant Maher struck a police horse with a rolled-up placard. There were

15 or 16 police officers present, two of whom were on horseback. Some pedestrians complained to the police of having to walk in the streets. "There was a lot of shouting going on" but Behr did not know which of the defendants were shouting or what they were shouting prior to the police captain's order to disperse.

Patrolman Koopman testified that after the second command was defined by Laub:

> " • • • the captain directed the ten patrolmen and one sergeant, who were across the street, to come over and disperse the crowd and also the two officers on horses and they came to the crowd from the Seventh Avenue side and they started telling everybody to disperse and at that time—then the horses came on behind the foot patrolmen and then Mr. Maher ran past me and ran over to one of the horses and started smacking it with some kind of a sign, or something. I don't know what he was hitting it with. That's when everybody started shouting and yelling and running."

As a result of the commotion on Duffy Square, a crowd was caused to collect, numbering approximately 2,000.

Officer McNulty testified that defendant Meisner "was running around • • • calling to others, shouting that they did not have to leave; that they could stay". The officer told Meisner, "he must keep moving and not to try to encourage these people to stay any longer. He continued to shout that this is America" and was then arrested. De- [fol. 533] fendant Jerome was told to "move away" after he was observed "running from one group to another around the park", behind a mounted policeman who was attempting to disperse the crowd, and shouting that the demonstration was lawful and "the fascist police had no right to stop them". Jerome refused to move and was arrested.

Patrolman Engelhardt testified that he arrested the defendants Shallit and Chadwick. Miss Chadwick "was standing on the sidewalk yelling" to officers who were at-

tempting to remove the defendant Kunis after he lay down in the street, "Leave him alone facists [sic]". Chadwick then sat dowm on the sidewalk herself, refused to get up, and when the officer "went to pick her up * * * she started punching me and went to bite me". Defendant Shallit was shouting to the demonstrators not to move, calling the police "fascists" and shoving and pushing officers.

Patrolman Coffey testified that defendant Rhoads was screaming and running, and when he refused to leave the Square, he was arrested. As the officer was taking Rhoads to a commandeered cab, "Ostrow came over and told me to leave the defendant (Rhoads) alone"—he (Ostrow) was screaming "fascist cop" and was told to be quiet or he would also be arrested. He refused and was arrested.

Patrolman Campbell testified that after Captain McAllister spoke to Laub about dispersing, Laub, through the megaphone, told the crowd not to break up and called the police "fascist cops". The officer asked Laub "to move off the sidewalk", Laub refused and was arrested.

Officer Hines testified that defendant Copeland spoke to the crowd through a megaphone and "was going back and forth across Duffy Square". Copeland was asked if he had a permitt for use of the megaphone, claimed he did [fol. 534] not need one, was ordered to leave the area, refused, and was arrested.

Patrolman Fahy testified that defendant Kunis was "yelling and screaming 'fascists, police brutality, gestapo' ", was told to stop or be arrested, ran "into the middle of Broadway and laid down", refused to move, causing traffic to back up, and was arrested and carried to a radio car. Defendant Eckhardt was also "lying" in Broadway, refused to get up, and was assisted to his feet and then arrested.

Patrolman Knoll testified that defendant Gelles was standing on the sidewalk with two others, was told he was blocking traffic and should move, ranted at the office about "fascist cops", refused to move on, invited his own arrest, and was arrested. The officer was placing Gelles in a cab

when he saw the defendant Kyllingstad slap a police sergeant with whom she had been "loudly conversing". She was then arrested.

Patrolman Walsh testified that he arrested the defendants Apter, Martin and Teahan. Apter was running back and forth from street to sidewalk telling the crowd not to obey the police orders, was told to desist, continued his shouting to the crowd, and was arrested. He then threw himself on the ground and, as the officer tried to put him in a cab, defendants Martin and Teahan intervened and attempted to take Apter away while yelling "Police brutality * * * gestapo". They were warned to move away or be arrested, refused, and were arrested.

Upon cross-examination, Officer Walsh testified that in his opinion there were "about 250 to 300" people present at the demonstration, traffic was stalled because "at intervals the crowd would keep running back and forth into the street with placards * * * so, we attempted to get them back on the sidewalk, to put the traffic through".

[fol. 535] Patrolman Annitto testified he arrested the defendants Maher and Turner. Maher was "running around * * * waving a placard. He struck a police horse with the placard" and was arrested. "Turner was screaming and hollering and trying to keep two policemen from keeping the prisoner they were trying to bring to the car".

Defendant Philip Luce, the first witness called by the defense, testified that he arrived at Duffy Square on August 8, 1964, at approximately 3:45 P. M. He was an organizer and leader of the meeting and about 10,000 leaflets had been distributed around the city announcing the meeting. Before the speeches started, Luce and some others present were told by a uniformed policeman:

> "* * * that we could not hold a meeting there; that there was a ban on demonstrations in Times Square; that we could move either north of 59th Street or south of 40th Street and hold a meeting; but that no meeting would be allowed within that area."

Luce further testified that about 20 or 25 people were given identifying arm bands and were placed around the perimeter of the Square "in charge of keeping the crowd orderly" and preventing people from going out into the street. About 100 to 150 people were gathered at the Square for the speeches. Laub opened the meeting by stating it would be "a peaceful, orderly meeting", introduced him (Luce) and he spoke briefly on behalf of the "May 2nd Movement". Luce then turned over the meeting to Copeland. The people assembled did not push, shove, fight or carry weapons. "The entire assembly" was on the Square, not on the street, and there was no interference with vehicular traffic. After Copeland had spoken for 15 or 20 seconds, a police officer [fol. 536] informed them that the meeting was illegal and had to be terminated. Copeland continued speaking and Laub then repeated the officer's command to the crowd. There was no disturbance until suddenly about 12 foot police appeared and two mounted police rode into the crowd and arrests were made.

Upon cross-examination, Luce testified that he, Laub, and Copeland used the megaphone and it was possible that some people were on the street as well as the sidewalk.

Joseph Lelyveld, a New York Times reporter, was called for the defense and testified that he arrived at Duffy Square shortly before 4:00 P.M. and none of the demonstrators had yet arrived. About 15 minutes or half an hour later, people with signs arrived, some distributing leaflets, and the speakers, standing on the steps, began the proceedings. There were no more than 60 people listening and they were all compactly on the sidewalk of the Square. The situation became chaotic after the police requested the crowd to disperse, and several people started speaking at once, protesting the police order and announcing defiance of it, after which the police moved in. The witness did not think there was any interruption with traffic prior to the police moving in to disperse the crowd. The number of people on Broadway and Seventh Avenue seemed normal for a Saturday afternoon in the summer of 1964.

Upon cross-examination, Lelyveld testified that as the meeting was being dispersed, "traffic was pretty well stopped, because prowl cars were converging on the park and all empty taxicabs were being stopped". The witness saw a girl hit a policeman and a boy lie down and hold himself stiff while being carried into a police car. He did not recall seeing any of the demonstrators on the street although he was unable to observe the entire area.

[fol. 537] Defendant Albert Maher testified that he hit a police horse with a rolled-up placard in order to make it shy away and to prevent it from stepping on a person who had fallen to the ground. The witness estimated the size of the gathering at about 100 people.

Defendant Ostrow testified he was given an arm band and designated as a monitor to help maintain order and keep those attending the meeting within Duffy Square itself and not out on the street. He estimated there were between 80 and 100 people present.

Defendant Teahan testified that he saw Kunis lying on the sidewalk (not the street) and then being carried by the police to a car. He alleged he was pushed around by several policemen, finally being pushed into the road in front of a squad car and was then "grabbed" by an officer, who said, "Come along with me" and took him to a commandeered cab, put him in and "proceeded to punch me in the mouth, with two witnesses (defendant Martin and Officer Walsh) present". He denied trying to pull the defendant Apter away from Officer Walsh.

Defendant Martin testified he had come to the meeting to speak, and, after seeing Copeland and Meisner led away by the police, he followed and:

> "• • • was approached by an officer who said, 'Do you want to go too, Bud?' and I could see him only out of the corner of my eye. I reeled a little bit, and he grabbed me under an arm; and another officer grabbed me under this arm; and they carried me to a cab, where the defendant Apter and Patrolman Walsh were already in; and they threw me in the front seat."

Martin denied having interfered with the arrest of defendant Apter, but admitted he "may have" yelled things, [fol. 538] like "fascist police", "brutality", etc. He also denied resisting arrest but claimed he was in severe pain because the police were poking him in the kidneys.

Defendant Apter denied sitting or lying down in Duffy Square. He was a monitor with an arm band, designated to keep order and prevent people from "spilling into the street or obstructing traffic". He admitted he was running around and screaming "fascist cops".

Defendant Eckhardt testified that he had followed defendant Kunis as Kunis was being carried to a patrol car after sitting down on the sidewalk. He was not taken to the car or even touched by the police and was told he was arrested after arriving at the station house. He denied lying down on the street.

Defendant Chadwick testified that she saw defendant Kunis either lie down or sit down on the sidewalk and then lifted and taken to a patrol car by the police. She never saw Eckhardt sit or lie down. She admitted trying to bite Officer Engelhardt but did not believe she punched him.

Defendant Kunis testified that he sat down on the Square. He saw horses "turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people" and "I had no other recourse but to sit down and refuse to cooperate with the people inflicting what I saw upon the crowd". Upon cross-examination, Kunis admitted that "when the police came to take me I went completely limp and laid down"—on the sidewalk, not on the street. His body was in a stiff position while being carried and he did not intend to cooperate with the police.

Defendant Kyllingstad testified and denied that her "actions could have been construed as slapping a police officer". She admitted she struck an officer on the back in the [fol. 539] course of attempting to convince him not to arrest defendant Laub.

Defendant Meisner testified he made no noise prior to the time the police began dispersing the crowd, but then

yelled, "Let them speak" and may have shouted "that they did not have to leave; that they had a right to speak; that that was a constitutional right". He denied having refused an officer's request to leave the sidewalk.

Defendant Turner testified he was not a member of any sponsoring organization but was asked by Laub and agreed to serve as a monitor to "help maintain order, to allow for pedestrian traffic, and to keep people out of the street". He estimated that "possibly 100 people, and no more, were in attendance at the meeting" prior to the arrival of the police. After the order to disperse, the crowd was chanting "Let them speak". He added:

> "Well, the chanting continued for about—no more than a minute and a half, when nothing happened, when the Captain and a few patrolmen who were in a line across the front of the steps left the scene; and, suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square."

Upon this appeal, defendants-appellants argue: (1) that the record fails to show "substantial interference with normal traffic movements" prior to the police order to disperse so that there was no violation of Penal Law, Section 722 and therefore, the order to disperse was without au- [fol. 540] thority and failure to obey it was not unlawful; (2) the order to disperse was an unwarranted interference with appellants' constitutional rights to freedom of speech and peaceful assembly as those rights have been enunciated by the United States Supreme Court; (3) if Captain McAllister's order was based on a general police ban of all meetings and demonstrations in the area, "such a ban over an extensive area for an indefinite time is clearly unconstitutional"; (4) under the circumstances, both the meeting

and appellants' failure to obey the order to disperse were constitutionally protected conduct; (5) evidence of any of the appellants' conduct following their refusal to obey the order to disperse may not be considered in support of their convictions; and (6) subdivisions 2, 3, and 4 of Penal Law, Section 722, as applied to street meetings, are so vague and uncertain as to be violative of due process of law.

Firstly, let it be said that the evidence in the record of a general police ban on meetings in the area is, at best, very sketchy and would clearly be an insufficient basis upon which to premise the prosecution's case.

Secondly, although the prosecution introduced evidence that Duffy Square was technically a "park" and that Park Department Regulations require a permit for public meetings, it is clear that such evidence was not subsequently relied upon in any fashion and is not urged as a basis for sustaining the convictions here. This aspect of the case will not be considered.

Thirdly, while subdivisions 2, 3 and 4 of Penal Law section 722 contain terms which are general and may be subject to differing interpretations, it need not follow that [fol. 541] they are, therefore, too vague and indefinite to adequately provide guide lines for appropriate and inappropriate conduct at street meetings. The provisions of these subdivisions have been many times the ready subject of reasonable construction and application to public behavior, oftentimes proscribing it, while frequently rejecting, as unlawful, its inhibition (see e.g., People v. Bogin, 248 N.Y. 530; People v. LoVecchio, 185 Misc. 197; People v. Hussock, 23 N.Y.S. 2d 520, cert. den. sub. nom. Hussock v. New York, 312 U.S. 659).

It should be noted that it is unquestioned that evidence of a violation of any subdivision of section 722 of the Penal Law will support a conviction thereunder, regardless of whether the complaint charges a defendant under one par-

ticular subdivision or another (People v. Carcel, 3 N Y.2d 327, 331; People v. Hipple, 263 N.Y. 242, 244). Such being the case, the convictions would be proper if based on proof of conduct violative of any subdivision and it is clear that the trial court may have convicted certain defendants on the basis of conduct after the police order, and others for their conduct prior thereto. There is therefore no substance to the contention that conduct after the order may not be considered because the trial court may have found certain defendants guilty without proof of any such conduct. Further, there is ample in the wording of the complaint to justify sustaining the charges by evidence of conduct after the order. The complaint charges unlawful congregating, obstruction of pedestrian and vehicular traffic, noisiness, causing a crowd to collect, and a failure to follow the police order to disperse. Clearly defendants' conduct after the order is material and proper in showing the failure to obey it. I believe such proof to be proper [fol. 542] within the charges for violations falling under subdivisions 2 and 4 also.

We come then to the heart of the case—the lawfulness of the defendants' conduct and the appropriateness of the police command. Treating initially the charged violations under subdivision 2, our Court of Appeals has frequently weighed the nature and effect of a defendant's conduct as judged by the standards of this provision of Penal Law, section 722. As stated by the Court (per Burke, J.) in People v. Carcel, 3 N Y 2d 327, at pages 331, 332:

> "* * * The common-law definition of 'breach of peace', though not controlling, is helpful in ascertaining the nature of the acts proscribed by the statute. In *People* v. *Most* (171 N.Y. 423, 429) it was defined as a 'disturbance of public order by any act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.' (See *People* v. *Perry*,

265 N.Y. 362, 364; *People* v. *Pieri*, 269 N.Y. 315, 322; *Cantwell* v. *Connecticut*, 310 U.S. 296, 308.) Guided by this definition, the courts have indicated that *something more than a mere inconveniencing of pedestrians* is required to support a conviction under subdivision 2. As was stated in *People* v. *Nixon* (248 N.Y. 182, 187-188), 'Men and women constantly congregate or walk upon the streets in groups, quite oblivious of the fact that in some degree they are thereby causing inconvenience to others using the street. A public meeting may have aroused such interest that groups of men and women continue the discussion while walking up and down the street. Groups linger in quiet social converse after the religious edifice where ser- [fol. 543] vices have been held is emptied. School children and college youths, laborers, athletic "fans" and church members, perhaps even judges, do at times congregate or walk upon the streets in numbers sufficient to cause other pedestrians to stand aside or step into the roadway. Surely such conduct is not always "disorderly" and does not always tend to a breach of the peace.' In the *Nixon* case it was held that there was insufficient evidence to warrant a conviction under subdivision 2 of section 722, although it was shown that the 20 defendants were parading on a New York City street 4 abreast on a sidewalk only 12 feet wide. 'The regular amount of traffic was just barely getting through' (p. 185) and the obstruction caused by the pickets was such that some people were caused to enter the roadway to pass. Certainly the evidence against defendants in the case at hand was no more impressive than that offered by the People in the *Nixon* case. There is absolutely no showing here that defendants caused any *serious* annoyance to pedestrians or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that, the defendants

'were blocking the pedestrians' right of way'. That evidence we hold to be insufficient (*People* v. *Nixon, supra; People* v. *De Cecca,* 6 Misc 2d 213; *People* v. *Kieran,* 6 Misc 2d 245; *People* v. *Barisi,* 193 Misc. 934, 935; *People* v. *Lo Vecchio,* 185 Misc. 197)." (Emphasis supplied.)

It is difficult to precisely define just how "serious" the annoyance or interference must be and the evidence did not clearly establish which, if any, of the defendants could be [fol. 544] deemed in violation of this subdivision (2) prior to the order to disperse, but the testimony of the arresting officers, apparently deemed credible by the Trial Court, reciting the individual defendant's conduct after the order, would, in my view, abundantly support the convictions under subdivision 2 of all save perhaps Laub and Copeland. Kunis, Chadwick, Eckhardt and Apter all lay down or sat down; all but Eckhardt were yelling and screaming and inciting to disorder. Meisner, Jerome, Shallit, Rhoads, Ostrow, Gelles, Kyllingstad, Martin, Teahan, Turner and Maher were running about interfering with police officers, shouting and screaming and generally causing bedlam. All these defendants clearly acted "in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others".

For me, it would be difficult, if not impossible, to justify this conduct even were it determined that the police order was improper and without lawful authority. While it is clear that "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" (Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776), there is no support for the proposition, seemingly advanced here, that if the order were improper, any and all of defendants' subsequent conduct would be cloaked with an immunity to arrest. I do not believe the order to be improper, but quite aside from the import of a refusal to obey that order (a

violation of subdivision 3 discussed *infra*), the defendants are properly chargeable with the nature and consequences of their acts. Even a completely unlawful police arrest will justify only "reasonable resistance" (People v. McNeil, 15 N Y 2d 717). An unlawful arrest would afford a defendant

> [fol. 545] "the right to resist and use 'force and violence' against the officer 'in preventing or attempting to prevent an offense against his person' provided such 'force or violence used [was] not more than sufficient to prevent such offense' (Penal Law, § 246 subd. 3)" (People v. McNeil, 21 A D 2d 1, 2, affd. 15 N Y 2d 717).

But this does not sanction the conduct set forth here in defiance of a police order to disperse—not in defiance of an unlawful arrest and, in fact, prior to any arrest. Most emphatically, it cannot justify the conduct of those who sought to protest the arrests of others. There were no arrests made before the defendants conducted themselves in the manner set forth above and not before all of them were repeatedly warned to desist (cf. People v. Nixon, 248 N.Y. 182, where the arrests were made without warning). This is simply not a case where the convictions depend upon the conduct of the defendants in resisting an unlawful arrest (cf. People v. Cherry, 307 N.Y. 308).

In People v. Sara E. Penn et al, Appellate Term, February, 1964, No. 45, affirmed 16 N Y 2d 581, motion for reargument denied —— N Y 2d ——, September 30, 1965, this Court upheld convictions under subdivisions 2 and 3 based upon (1) the defendants' conduct in darting and sitting in front of and under trucks, thereby interfering with their movements and causing them to stop, and (2) the defendants' refusal to move when ordered to do so by the police. As was stated in the majority opinion in Penn:

> "While it is true that the Supreme Court of the United States has held that public grievances are

within the constitutional protection of the First Amendment, it has also held that the manner of protest [fol. 546] is subject to reasonable regulation and control in the interest of public safety and order. (Cox v. New Hampshire, 312 U.S. 569; Giboney v. Empire Storage Co., 336 U.S. 490; Cantwell v. Connecticut, 310 U.S. 296). Also see: People v. Galamison, 43 Misc. 2d 72; People v. Martin, 43 Misc. 2d 355.

"In Cox v. New Hampshire, supra, at p. 574, The Court said:—

"'Civil liberties as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * *'.

"In Giboney v. Empire Storage Co., supra, at p. 498, the Court said:—

"'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to * * * conduct in violation of a valid criminal statute. We reject the contention now. * * *'.

[fol. 547] "In Cantwell v. Connecticut, supra, at p. 308, the Court said:

"'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. * * *.'"

See also Schneider v. State, 308 U.S. 147, where the Supreme Court struck down unconstitutionally restrictive ordinances against the dissemination of information or opinion but stated at pages 160-161:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all [fol. 548] traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of

> such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

In the instant case we have no attempt to improperly limit opinion or its public expression. This was no effort to restrict, unconstitutionally, freedom of religion or dissemination of religious views (Cantwell v. Connecticut, 310 U.S. 296); nor to discriminate between conformist and nonconformist views; nor was there evidenced any form of prior restraint (cf. Burstyn v. Wilson, 343 U.S. 495; Kunz v. New York, 340 U.S. 290; Niemotko v. Maryland, 340 U.S. 268; Saia v. New York, 334 U.S. 558; Rockwell v. Morris, 12 A D 2d 272, pp. dism. 9 N Y 2d 791, cert. den. 368 U.S. 913). The conduct of the defendants here may not be properly likened to peaceful picketing and, as was noted in the dissenting opinion in *Penn*, the defendants there had not impeded street traffic and they had demonstrated in a private driveway rather than a public street—facts cogently different from those presented here.

Further, as stated above, I believe the police order to have been proper. Our state courts have upheld *reasonable* action of the police in seeking to disperse street meetings in areas where a breach of the peace or possibility of disorder may arise—especially in heavily-trafficked areas where [fol. 549] vehicles and pedestrians are or may be obstructed (People v. Feiner, 300 N.Y. 391; People v. Hipple, 263 N.Y. 242; People v. Kunz, 285 Misc. 316; People v. Friedman, 14 N.Y.S. 2d 389). The police, in performing their duties,

> "• • • may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder. Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful" (People v. Nixon, 248 N.Y. 182, 188-189).

See also, People v. Galpern, 259 N.Y. 279, 281. As was most aptly stated by the United States Supreme Court in the recent case of Cox v. Louisiana, 379 U.S. 536, at pages 554-555:

> "• • • the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red [fol. 550] light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting *in the middle of Times Square* at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement." (Emphasis supplied.)

In sum, it is my view that the police request to disperse was made in the line of a "duty and responsibility to keep their streets open and available for movement" (Cox v. Louisiana, supra, p. 555), but even if the order were unnecessary or improper, the subsequent conduct of the defendants would nevertheless be unjustified and violative of subdivision 2.

In view of the general police order which was announced to the assemblage, it would seem plausible that all defen-

dants would appropriately be charged with a violation of subdivision 3 of Penal Law, section 722. There is, as well, testimony in the record of specific refusals to obey the order of an arresting officer in the case of all defendants excepting Kyllingstad, Maher and Turner. What then of the propriety of the convictions under this subdivision? Contrary to appellants' assertion, subdivision 3 would not, by its terms, "prohibit all street meetings". It requires both that defendant "congregates with others" and "refuses to move on when ordered by the police". There must be a showing of an actual or potential breach of the peace together with a congregating and refusal to obey the police order. Although those congregating may do so in an orderly and inoffensive way, in the absence of a showing that the police direction "was purely arbitrary and was not calculated in any way to promote the public order", the refusal to obey [fol. 551] violates the statute (People v. Galpern, 259 N. Y. 279, 284-285).

Have recent Supreme Court decisions rendered untenable the interpretation thus placed on subdivision 3 by our State courts? I think not. Appellants rely heavily on Edwards v. South Carolina, 372 U.S. 229, and Cox v. Louisiana, supra, but analysis of the holdings there does not compel a determination that subdivision 3 is unconstitutional either on its face or as here applied.

In *Edwards,* 187 students, protesting discrimination, marched to the grounds of the State House in Columbia, South Carolina. They marched around the grounds, carrying placards, for approximately 45 minutes, and

> "• • • As they entered, they were told by the law enforcement officials that 'they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful.'"

Some 200 to 300 spectators had gathered to observe the march and "nobody among the crowd actually caused or threatened any trouble" (372 U.S. at 231). Most impor-

tantly "[t]here was no obstruction of pedestrian or vehicular traffic within the State House grounds * * * [a]lthough vehicular traffic at a nearby street intersection was slowed down somewhat [and] an officer was dispatched to keep traffic moving". The police authorities then advised the group that there would be arrests unless they dispersed within 15 minutes.

> "* * * Instead of dispersing, the petitioners engaged in what the City Manager described as 'boisterous,' 'loud', and 'flamboyant' conduct, which, as his later [fol. 552] testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail." (372 U.S. at 233).

The Court, in reversing convictions based on a breach of the peace under State law, specifically stated:

> "We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308; *Garner* v. *Louisiana*, 368 U.S. 157, 202 concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not suspectible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently

> opposed to the views of the majority of the community to attract a crowd and necessitate police protection."

In other words, the thrust of the Court's holding, under facts markedly dissimilar from those with which we are [fol. 553] confronted, was to vitiate a statute which was aimed at and employed for the purpose of inhibiting, by means of criminal sanction, "the peaceful expression of unpopular views". We have no such case here. There is no claim, nor could there be, that either the statute here involved or the police action taken was meant to restrict the expression of views, popular or unpopular. There is no discriminatory application alleged. Our determination is clearly made by means of "evenhanded application" of a regulatory statute which, reasonably construed, is meant to insure maintenance of order by "limiting or proscribing" certain conduct.

The opinion in *Edwards* specifically pointed out that the fact situation there presented "was a far cry from the situation in *Feiner* v. *New York*, 340 U. S. 315", where the Supreme Court last had an opportunity to interpret and pass upon the validity of subdivision 3 of Penal Law, section 722. In *Feiner*, the petitioner had been convicted in the Syracuse Court of Special Sessions for a violation of Penal Law, section 722, subdivisions 1, 2 and 3. His conviction had been affirmed in the New York Court of Appeals (300 N.Y. 391) and the Supreme Court granted certiorari to determine whether "* * * the conviction is in violation of his right of free speech under the Fourteenth Amendment". The petitioner, in March, 1949, had been addressing a street meeting in Syracuse attended by approximately 75 or 80 people "both negro and white, filling the sidewalk and spreading out into the street". He had been referring derogatorily to President Truman, the American Legion, the Mayor of Syracuse, and other public officials. Police officers observed the scene for a while and, after indications of excitement, restlessness and some pushing and shoving, the officers "stepped in to prevent it from

[fol. 554] resulting in a fight". Petitioner was three times requested to stop speaking but refused to do so while "the crowd was pressing closer around petitioner and the officer". The officer then arrested the petitioner and brought him down from the wooden box upon which he was standing. The conviction was premised primarily on petitioner's failure to "obey reasonable police orders" (subd. 3).

The Supreme Court, in affirming, stated:

> "We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. * * * They found that *the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions.* Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.
>
> * * * * * * *
>
> "* * * This Court respects, as it must, the interest of the community in maintaining peace and order on [fol. 555] its streets. *Schneider* v. *State,* 308 U. S. 147, 160 (1939); *Kovacs* v. *Cooper,* 336 U. S. 77, 82 (1949). We cannot say that the preservation of that interest here encroaches on the constitutional rights of this

petitioner." (340 U. S. at 319-320) (Emphasis supplied.)

In *Cox* v. *Louisiana,* supra, appellant, a leader of approximately 1500 students who had peacefully demonstrated in the vicinity of the Baton Rouge Court House, against discrimination generally and particularly the jailing of 23 fellow students, subsequently refused a sheriff's order to break up the demonstration as it was about to move uptown to several luncheon counters to protest discrimination there by means of a sit-in. Tear gas dispersed the demonstrators, and the following day appellant Cox was arrested, and later convicted of disturbing the peace, obstructing public passages and picketing before a court house. The Court, in reciting the facts, pointed out that the entire demonstration was orderly and peaceful and there was no obstruction of traffic. There was further evidence that the police had condoned the demonstration at the court house so long as the group remained on the "west sidewalk" and that Cox had kept them there. The only evidence of potential unrest was some "muttering and grumbling" by some whites as Cox spoke of the "illegal arrest" of the 23 students and then asked the crowd to move uptown to the lunch counters and sit in for an hour if they were refused service.

The Court, in reversing the breach of peace and obstructing public passages convictions, specifically held unconstitutional the Louisiana "disturbing the peace" statute (La. Rev. Stat., § 14:103.1), a statute markedly similar to Penal [fol. 556] Law, section 722, subdivision 3, and determined that the case was governed by the holdings in *Edwards* v. *South Carolina,* supra, and *Fields* v. *South Carolina,* 375 U.S. 44, constituting an infringement by Louisiana against Cox's rights of free speech and free assembly. The Court specifically held:

"• • • Louisiana may not constitutionally punish appellant under this statute for engaging in the type of

conduct which this record reveals, and also that the statute *as authoritatively interpreted by the Louisiana Supreme Court* is unconstitutionally broad in scope" (379 U. S. at 545.) (Emphasis supplied.)

The Court pointed out that the demonstration was "very well controlled" and the group was "orderly" and not, according to the sheriff's testimony, "objectionable" before Cox urged them to move uptown for the sit-in. The record further showed that the singing of the students resulted only in some cheering and applause by their 23 incarcerated fellows and the general mood was never "hostile, aggressive, or unfriendly". The Court found the arrest to be falsely cloaked in the power of the State to protect the public safety and order.

It is my view that the Court, in Cox, deemed the statute involved unconstitutional as it had been interpreted and applied in the State of Louisiana. I do not feel that the decision mandates a finding of unconstitutionality for subdivision 3 of our disorderly-conduct statute. (A reading of the concurring opinions in *Cox* v. *Louisiana*, companion case No. 49 [379 U. S. 559], supports this position.) There is no indication that the implicit upholding of the constitutionality of subdivision 3 in *Feiner* v. *New York*, supra, has [fol. 557] been undermined (cf. language of Mr. Justice Clark, 379 U.S. at 589). Clearly, the application of subdivision 3 to the convictions here involved, was not an attempt to suppress unpopular views, but was aimed solely at the maintenance of order and the avoidance of obstruction to vehicular and pedestrian traffic. There is no "unlimited power to order people off the streets", but rather an authority to reasonably regulate to avoid actual or potential breaches of the peace in the public interest. There is no evidence that administration of the statute here has been "otherwise than in a fair and non-discriminatory manner which the State court has construed it to require" (Cox v. New Hampshire, 312 U. S. 569, 577). Finally, it should be noted that the Court of Appeals in affirming this Court's

determination in *People* v. *Penn*, 16 N Y 2d 581, was aware of the decision in *Cox* v. *Louisiana*, (see 16 N Y 2d at 582) and specifically held that there was no denial of the defendants' constitutional rights.

I am of the view that subdivision 3, as applied, remains constitutional and that the convictions are valid under both that subdivision and subdivision 2.

The judgments of conviction are affirmed.

CONCURRING MEMORANDUM

CAPOZZOLI, J.:

There is no doubt about the fact that each and every citizen is immune from arrest and prosecution if he engages in a peaceful, orderly and lawful demonstration for the purpose of dramatizing grievances or to call attention to political views. But demonstrations conducted in a disorderly and unlawful manner resulting in deprivation of the rights [fol. 558] of other citizens, are not to countenanced and cannot be justified under the law.

In the case at bar, by virtue of the guilty verdict rendered by the court below, it must be concluded that the court found that the behavior of these defendants, and others, before the police ordered the termination of the meeting, was interfering with pedestrian and vehicular traffic. In view of that fact the police officers were duty bound to protect the public and were acting legally when they sought to end the meeting. (People v. Sara E. Penn, et al., Appellate Term, First Department, February 1964, No. 45, affd. 16 N Y 2d 581.)

Under the circumstances disclosed in the record the conviction was justified and must stand.

DISSENTING OPINION

HOFSTADTER, J.:

I dissent.

The 17 defendants were convicted of disorderly conduct (Penal Law, 722 [2, 3, 4]) under a single, omnibus complaint charging that on August 8, 1964, at 4:25 P.M., they unlawfully assembled at Duffy Square, "obstructing the area to the exclusion of those wishing to use the same" and delayed "vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered [by the police] to move on the defendants did fail to do so, after being informed that their actions were not lawful". None of these charges were established upon the trial, except only the admitted refusal of the defendants to disperse when ordered to do so by the police captain in charge of ten patrol-[fol. 559] men, two mounted officers and a sergeant. Implicit throughout the record is that the police had decided to prevent the meeting before it assembled, though proof of this predetermination was erroneously foreclosed by the trial judge.

On this appeal, the People urged, and my brethren have accepted, as the basis for affirmance, the defendants' defiance of the police order and matters subsequent to it and attendant upon its forcible execution. I cannot agree; for this predicate of affirmance is without validity in divers aspects. The occurrences now offered as a basis for upholding the convictions were not the subject of the complaint charged. And the events, including any alleged disturbance by any defendant, ensuing upon the order, were the direct and immediate issue of a misconception by the police of the lawful warrant and scope of their authority.

The "May 2nd Movement" is a "peace" organization formed at Yale University. At 4 P.M. on August 8, 1964 it undertook to hold a rally at Duffy Square to protest against American involvement in the Viet Nam war. A

captain of police ordered the group to disperse within five minutes after a speaker sought to introduce a chairman for the meeting. Nothing of substance had yet been uttered by either. No one had indicated any purpose other than by word of mouth to draw attention to the sponsors' opposition to the Viet Nam war. All was peaceful—neither pedestrian nor vehicular traffic had been perceptibly slowed—certainly, neither was halted.

When defendants refused to terminate the rally, the captain ordered his men on horseback and on foot to disrupt the assembly. Within 20 minutes after its inception, the order was executed; and the defendants were arrested and charged with disorderly conduct.

[fol. 560] But, meetings such as this one are fully protected by the First and Fourteenth Amendments (as well as by the State Constitution—Article I, sections 8, 9). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public; and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (Hague v. C. I. O., 307 U. S. 496, 515; Kunz v. New York, 340 U. S. 290, 293; Cox v. Louisiana, 379 U. S. 536, 555). Before a rally may be dispersed, the speakers must have passed the bounds of argument of persuasion and undertaken incitement to riot (Feiner v. New York, 340 U. S. 315, 321).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears", may the State interfere with a demonstration (Cantwell v. Connecticut, 310 U. S. 296, 308). Absent these elements, a demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229; Fields v. So. Carolina, 375 U. S. 44; s.c. 372 U. S. 522). No such conditions existed during the instant demonstration. Hence, the police were without warrant to proscribe or disrupt it. The order and action thereon had no justification; the resultant disturbance was

part of the *res gestae* engendered by them—culpability for which is imputable to the police—not to the defendants.

The orders of the policemen could not make the conduct of the defendants, otherwise lawful, unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776; People v. Collins, 44 Misc 2d 430, affd. 16 N Y 2d 554; see also Lombard v. Louisiana, [fol. 561] 373 U. S. 267; Shuttlesworth et al. v. City of Birmingham, 373 U. S. 262; Johnson v. Virginia, 373 U. S. 61; People v. Galpern, 259 N. Y. 279, 281). Enforcement of the law must itself be lawful to serve as predicate for criminal charges.

The commotion which inevitably ensued was the result of the gratuitous and forcible invasion of the rally by the police—not of the conduct of the defendants. Confronted with the police assault, defendants could legally do what was reasonably necessary to resist the unlawful aggression (Penal Law § 246[3]; People v. Allen, 15 N Y 2d 558, 559; People v. Dreares, 15 A D 2d 104, affd. 11 N Y 2d 906; People v. Cherry, 307 N. Y. 308). "Lacking the essential warrant, having abused the authority which was their trust, the officers stood bereft of their usual prerogatives" (People v. Cherry, *supra*, at p. 311). In this context, defendants were liable to criminal sanctions only if they pursued a "counterattack merely for the sake of revenge or the infliction of needless injury" (People v. McNeil, 15 N Y 2d 717, 718). The record shows none; indeed, it renders it manifest that the efficient, moving cause of any disturbances was the unlawful police action.

Apart from these considerations, egregious error is compounded by affirmance founded on any alleged disturbance—by *some* defendants—following the dispersal order. Whether, in the case of any defendant, his conduct went beyond permissible protest is not before us, nor was it before the trial court. The complaint was not founded on

any such claimed conduct. By it, none of the defendants were charged with assault or physical attack on policemen; none were accused of resisting arrest; none were charged with counterattacking the police. The only omnibus charge made against all—who were tried jointly—was that they [fol. 562] had congregated at Duffy Square illegally; had impeded traffic; had caused a crowd to collect; and when ordered to move on, failed to do so. The evidence utterly fails to sustain this complaint.

It assumed the validity of the unlawful order. This ill-founded assumption taints the entire record. In the main, the evidence adduced on the trial was tangential, if not wholly irrelevant, to the only issue which could be properly agitated under the complaint, i.e.: the conduct of the defendants *before* police intervention. We may not perpetuate its vice here. The complaint was not adequate to sustain the charges upon which conviction was rendered by the trial court nor as the predicate of the offenses now pressed upon us to sustain that judgment.

To charge defendants with one crime and convict them of others is to violate every procedural concept of American jurisprudence. As it is a "violation of due process to convict and punish a man without evidence of his guilt" (Thompson v. Louisville, 362 U. S. 199, 206), "conviction upon a charge not made would be sheer denial of due process • • •. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (De Jonge v. Oregon, 299 U. S. 353, 362, 365.) The convictions here may not stand—they were not based on charges made; and those set forth in the complaint were not substantiated in the evidence.

Stripped of the immediacies, here a fundamental right was suppressed under guise of preserving order. Judged [fol. 563] in the context of the purpose of the rally, defendants' acts were constitutionally protected (Giboney v. Empire Storage Co., 336 U. S. 490). "The holding of meetings for peaceable political action cannot be proscribed" (De Jonge v. Oregon, supra, 299 U. S. 353, 365). Defendants were entitled to their opinions. Right or wrong, they had the constitutional prerogative—and immunity—peaceably to express them without hindrance by the police. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views" (Edwards v. South Carolina, 372 U. S. 229, 237). Those who wish to disseminate ideas need not present them first to police authorities for their consideration and approval (Cox v. Louisiana, 379 U. S. 536, 557). As Dean Lohman observed recently "Officers must act as impartial referees to prevent violence". They may not resort to the oppressive use of putative law to stifle peaceful protest!

"Compulsory unification of opinion achieves only the unanimity of the graveyard. • • • the First Amendment • • • was designed to avoid these ends by avoiding these beginnings. • • • Authority here is to be controlled by public opinion, not public opinion by authority." (Board of Education v. Barrette, 319 U. S. 624, 641.) Earlier this year President Johnson told 10,000 college students: "free speech • • • free assembly • • • parades • • • and demonstrations • • • are what you and all other Americans need to stand up for today". He recognized that such freedom of speech—in protest—is the *secret* weapon of an *open* society—the well-spring of its vitality. It nourishes the spirit and practice of civility. Men's instinctual violence—in disagreement—is conducted into peaceful channels. And it is salutary for the State in that it serves as a safety valve in times of stress and strain. Cardozo summed it up [fol. 564] as "the matrix • • • of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). But

speech, to be potent, must be audible. As I had occasion to point out in another context: "A right which is effective only when not needed, is scarcely a right at all" (The Fifth Amendment and the Immunity Act of 1954, 10 The Record of the Assoc. of the Bar 453).

The convictions should be reversed and the complaint dismissed.

[fol. 565]

APPELLATE TERM, SUPREME COURT OF NEW YORK

FIRST DEPARTMENT

May #145

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

vs.

WILLIAM TURNER, et al., Defendants-Appellants.

JUDGMENT—November 12, 1965

An appeal having been taken to this Court by William Turner, et al., the defendants-appellants from judgments of conviction by Hon. Vincent R. Impellitteri, a Judge of the New York City Criminal Court, upon the charge of violating §722, subs. 2, 3 & 4 of the Penal Law, entered on the 2nd day of October, 1964, and said defendants-appellants having been sentenced by Hon. Samuel J. Ohringer, a Judge of said Court on the 18th day of November, 1964, as follows:

Defts. Maher, Laub, Rhoads, Ostrow, Shallit, Copeland and Teahan $25 or 5 days. Remaining defendants suspended sentences. Sentences of all defendants except Maher, Laub and Copeland, suspended and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgments so appealed from be and the same are hereby affirmed.

Enter

L. J. C., Justice, Appellate Term, Supreme Court, First Department.

[fol. 566]

CRIMINAL COURT

NEW YORK COUNTY

Docket Nos. 15605-15621

THE PEOPLE OF THE CITY OF NEW YORK,

—against—

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, "Jane Doe" a/k/a JOYCE GARDNER, ELLEN SHALLIT, ECKHART, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED. JEROME, JEREMIAH TEAHAN, KEY MARTIN and ROBERT APTER, Defendants.

NOTICE OF APPEAL TO COURT OF APPEALS OF NEW YORK

Please Take Notice that the defendants in this action, above named, hereby appeal to the Court of Appeals from a final judgment of conviction of the Criminal Court, entered in the office of the Clerk of the Criminal Court, New York County, on the 18th day of November, 1964, whereby the said defendants were adjudged guilty of the offense of disorderly conduct (Section 722 (2), (3) and (4) of the Penal Law of the State of New York) with sentences of $25.00 or 5 days for defendants Maher, Laub and Copeland; the other defendants receiving suspended sentences with the addition that defendants Konis and Kyllingstad be placed on probation. Said convictions were affirmed by the

Appellate Term, Supreme Court, First Department, on November 12, 1965.

Dated: New York, New York, December

Nanette Dembitz, Janet Ann Johnson, Attorneys for Defendants, New York Civil Liberties Union, 156 Fifth Avenue, New York, New York 10010, WA 9-6076.

To: Hon. Frank S. Hogan, District Attorney of New York County, 155 Leonard Street, New York, New York 10013.

Clerk of the Criminal Court, 100 Centre Street, New York, New York.

[fol. 567]

STATE OF NEW YORK

COURT OF APPEALS

Before Hon. Stanley H. Fuld, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

WILLIAM TURNER, et al., Defendants-Appellants.

CERTIFICATE GRANTING LEAVE—December 13, 1965

I, Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §520 of the Code of Criminal Procedure permission is hereby granted to the above named appellants to appeal to the Court of Appeals.

Dated at New York, New York, December 13, 1965.

Stanley H. Fuld, Associate Judge.

[fol. 568]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

Appeal No. 529-M-64

Docket No. C15605/21-1964

Present: Hon. Larry M. Vetrano, Justice.

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

WILLIAM TURNER, et al., Defendants.

ORDER MAKING JUDGMENT OF APPELLATE TERM THE JUDGMENT OF THIS COURT—November 17, 1965

Heretofore, and on the 12th day of November, 1965, the Appellate Term of the Supreme Court First Judicial Department, having affirmed the judgment of conviction heretofore entered in this Court on the 18th day of November, 1964.

Now, on motion, it is

Ordered, that the judgment of the Appellate Term be made the judgment of the Court, Part 2A.

Enter

Larry M. Vetrano, Judge.

[fol. 569]

IN THE COURT OF APPEALS OF NEW YORK

ORDER RE USE OF ORIGINAL RECORD—March 24, 1966

A motion having heretofore been made upon the part of the appellants to waive strict compliance with certain requirements concerning the record on appeal herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted to the extent that the appeal may be prosecuted upon the original record, the usual number of additional papers and briefs to be filed.

Gearon Kimball, Deputy Clerk.

[fol. 570]

IN THE COURT OF APPEALS OF NEW YORK

REMITTITUR—June 2, 1966

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur June 2, 1966.

[fol. 571]

App T. 1. No. 181. 66

THE PEOPLE &c., Respondent,

vs.

WILLIAM TURNER, & ors., &c., Appellants.

Be It Remembered, That on the 14th day of April in the year of our Lord one thousand nine hundred and sixty-six, William Turner, & ors., &c., the appellants in this cause, came here unto the Court of Appeals by Nanette Dembitz and Janet Ann Johnson, their attorneys, and filed in the

said Court a Notice of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, First Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 572] Whereupon, The said Court of Appeals having heard this cause argued by Nanette Dembitz, of counsel for the appellants, and by Mr. Frederick P. Hafetz, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

[fol. 573] Therefore, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, June 2, 1966.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[Seal]

[fol. 574]

IN THE COURT OF APPEALS OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 652

THE PEOPLE &c., Respondent,

vs.

WILLIAM TURNER & ORS., Appellants.

AMENDED REMITTITUR—July 7, 1966

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated.

And the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball, Deputy Clerk.

[fol. 575]

SUPREME COURT OF THE UNITED STATES

No. 399—October Term, 1966

WILLIAM TURNER, ET AL., Petitioners,

v.

NEW YORK.

ORDER ALLOWING CERTIORARI—Filed October 24, 1966

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on June 2, 1966.

Citations to Opinions

The judgment of the New York Court of Appeals, affirming without opinion the convictions of the seventeen petitioners, is unreported and is reproduced *infra,* p. A-1. The opinion of the Appellate Term, Supreme Court of the State of New York, First Department, together with the concurring and dissenting opinions therein, are reported at 48 Misc. 2d 611, 265 N. Y. Supp. 2d 841 (reproduced *infra*

A-5, 32, 33). No opinion was issued by the trial court, the Criminal Court of the City of New York.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Questions Presented for Review

1. Whether the petitioners were convicted without the due process of law guaranteed by the Fourteenth Amendment, because they were convicted without notice of the charges against them.

2. Whether petitioners' convictions for holding a street meeting to peacefully express political dissent, violate the guarantees of freedom of speech and assembly embodied in the due process guarantee of the Fourteenth Amendment.

3. Whether subdivisions 2, 3, and 4 of Section 722 of the Penal Law of New York State, under which petitioners were convicted, are so vague and uncertain as applied to street meetings, that they violate the due process guarantee of the Fourteenth Amendment.

Statute Involved

Section 722 of the Penal Law of the State of New York (Laws of 1923, c. 642, Sec. 1, as amended; McKinney's Consolidated Laws of New York, Book 39, Part 1) provides:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: • • •

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd; • • • ".

Statement of the Case

The Complaint

The complaint against petitioners in the Criminal Court of the City of New York charged that "at 4.25 p.m. on August 8, 1964, vicinity Duffy Square—47 St. and B'way . . . the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so after being informed that their actions were not lawful"; and that defendants thereby violated section 722, subdivisions 2, 3 and 4 of the Penal Law of the State of New York (R. 6).

Summary of Facts

According to the undisputed evidence, the street meeting leading to petitioners' convictions was held to protest the American policy in the Vietnam war, under the auspices of a group called the "May 2nd Movement", which had been formed a few months previously at Yale University (A-5, *infra;* T. 240-241, 321).[1] Duffy Square, where the meeting was held on a Saturday afternoon at about 4 o'clock, is a triangular area in midtown Manhattan, extending the length of one block, from 46th to 47th Streets. Towards both the 46th and 47th Street ends are statues, hedges, and railings; the large paved center section is unused and unbroken save for a subway grating (T. 263-264). Pedestrian traffic to and from the Square is permitted only at crosswalks at the 46th and 47th Street extremities, well-separated from the open center section by the statuary and fixtures.[2]

The speakers at the meeting stood on the steps leading to a statue of Father Duffy towards the northern end of the Square, with the audience in the center section (T. 282-284). Petitioners offered to prove that meetings for various causes such as bond rallies have been held in that section (T. 261-265).

One of the petitioners, acting as chairman, began the meeting, stating that "under the auspices of the May 2nd Movement we are here to have a peaceful meeting" (T. 59, 61, 66). After only a few minutes of speeches about the

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[1] "T." refers to the transcript of the trial, filed as part of the record in this Court.

[2] A photograph of Duffy Square was introduced in evidence as People's Exhibit 1 (T. 20-21); a similar photograph is filed in this Court with the record, by stipulation of counsel.

war in Vietnam, a police captain approached the speakers and ordered them to disperse the assembly. The chairman declared that the meeting should be allowed to proceed; the captain withdrew while the speeches continued; he returned after a few moments; he repeated his order and the chairman repeated his reply (T. 67-71). The police captain apparently had arranged for the physical dispersion of the meeting: suddenly, two policemen on horseback rode into the center of the Square where the audience was standing, to force its dispersion, accompanied by approximately a dozen foot patrolmen (T. 78-80, 85). As a chief prosecution witness testified: "Then the horses came on behind the foot patrolmen . . . That's when everybody started shouting and yelling and running" (T. 71-72). The petitioners tried to avoid the horses and to continue the meeting for some minutes until the police stated they were under arrest (as to their conduct during the police effort to force their dispersion, see *infra* pp. 8-9).

There was evidence that the police had pre-determined to break up the meeting (on the basis of a police policy later abandoned, and never acknowledged in court, to prohibit meetings for political dissent throughout a large area, regardless of traffic conditions).[3] Nevertheless, the prosecution attempted to prove, in an effort to justify the dis-

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[3] See T. 379, 274-275; and 302-303, 287-290 as to the police captain's failure to refer to traffic in his order to disperse. The policeman who recorded the meeting on a concealed miniphone, omitted the captain's remarks in the recording he played in Court (T. 68), and the prosecution failed to call the police captain as a witness; there was hearsay testimony only, admitted over objection, that he referred to traffic conditions in his order (T. 22-23). The trial court foreclosed proof as to the stated reason for the dispersal of the meeting (T. 89-90; see dissent, *infra* A-34).

persal order, that the meeting was interfering with pedestrian and vehicular traffic.

The only entirely disinterested witness to the meeting was a reporter from the *New York Times,* who was unacquainted with petitioners and present solely in a reportorial capacity, called by the defense (T. 279-281). Although other newsmen also attended the meeting (T. 282), the prosecution called only the participating policemen, its chief witnesses being two officers attached to the Police Department's Bureau of Special Services, who had had the speakers and previous meetings under surveillance (T. 18-19, 29).

The *New York Times* reporter testified that the meeting was peaceful, orderly, small relative to the size of the center area of the Square where it was held, and not "attracting very much attention at all" until the advent of the horses (T. 305, 282-286). Since the center section of the Square concededly was large enough to accommodate many more than the audience at its maximum estimate,[4] the prosecution contention was that the audience pressed forward towards the Father Duffy statue to hear the speakers; that consequently a few of the auditors stood in the gutter and the audience filled the Square from curb to curb, at a point near the speakers; that pedestrians walking north to south or vice versa therefore had to walk in the gutter at this point; and because of the people in the street that the automobiles had to "veer" from one lane to another in the adjacent broad avenues (each having a number of traffic lanes) (T. 27-28, 213-214).

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[4] Estimates of the number in the audience varied from 60 by the New York Times reporter, to 200 by the chief prosecution witness (T. 285, 26-27).

Even if the truth of this testimony is assumed—despite its overall contradiction by the *Times* reporter and numerous indications that it was contrived to fit the claim that the dispersal order was based on traffic conditions rather than pre-determined—the police captain admittedly gave no suggestion or order that the audience narrow itself in the Square as an alternative to dispersal. Further, the maximum inconvenience possible for pedestrians from the alleged curb-to-curb audience, was that they would have been forced to use the cross-walk at one end of the Square instead of proceeding to that at the other.

As to the conduct of the audience during the speeches, before the dispersal order, there was occasional handclapping (T. 67, 69) and according to the *Times* reporter "ordinary cheering . . . not particularly restrained, but I would not say it was a ruckus, or shrill, or anything like that" (T. 286).[5]

The prosecution testimony that thousands of pedestrians on the sidewalks facing the Square stopped to look at the meeting (T. 211-212) is wholly incredible, considering the *Times* reporter's testimony that the meeting attracted little attention and considering that it was uneventful prior to the advent of the horses. The Appellate Term opinion seems to assume that this prosecution testimony referred to the period after the order to disperse (*infra* A-7). In any event, even if such an occurrence could be relevant to petitioners' convictions,[6] there is no indication that the

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[5] One of the Bureau of Special Services policemen testified that before the meeting began a group of unspecified size chanted " 'Down with American imperialism' and 'Stop the war in Vietnam' and things of that nature" (T. 210). However, there was no indication that the alleged chant could be considered a disturbance of the peace.

[6] See *Edwards* v. *South Carolina*, 372 U. S. 229, 237.

alleged viewing of the meeting caused or threatened any obstruction or disturbance.

Most of the prosecution evidence related to the acts of individual petitioners in the period of the police effort to physically disperse them, between the advent of the horses into the Square and petitioners' arrests. Nine of the prosecution's eleven witnesses were policemen who had come to the Square only at the time of the dispersal order, each testifying as to additional individual acts.[1] There was no evidence of acts of violence, profanity or obscenity by petitioners, their most opprobrious term being "fascist police" or "fascist cop" as the policemen tried to drive them off the Square. While the policemen described petitioners as running around in the Square and "screaming", their "screaming" consisted mainly of declarations and calls to each other, as they scattered to avoid the horses, as to their right to continue the meeting (e.g., T. 82-85, 93-94). They submitted to arrest as soon as the police sought to arrest them. For example, the officer who arrested petitioner Rhoads testified:

> "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' and this and that and I observed Rhoads running towards the steps of the Square itself and I followed him up and told him he would have to leave the Square. If he didn't, he would have to be placed under arrest because he was part of the general disturbance there and he said he didn't want to leave and I told him if he didn't leave the second time I was going to place

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[1] None of these acts were included in the charges, and the evidence thereof should have been excluded in response to petitioners' due process objection (see *infra* pp. 12-14).

him under arrest and I placed him under arrest and I took him down from the center of Duffy Square by the monument there" (T. 105).

Similarly the officer who arrested petitioner Gellis testified:

> "I said, 'Please move along. You are not accomplishing anything by standing here.' Again he ranted, 'You can't tell me what to do. I have my rights.' I said, 'Mister, I am going to arrest you if you don't move on', and he said, 'Go ahead and arrest me.' . . . Q. All right, what happened then? A. I informed him I placed him under arrest and walked across in front of the Square, which would be the south of the Square, and placed him in a cab" (T. 142-143).

The policemen emphasized that petitioner Maher hit one of the police horses with a rolled-up cardboard placard (T. 190). Mr. Maher testified without contradiction that he was attempting to keep the horse from trampling on another young man who had stumbled and was lying near the horse's feet (T. 322-328). None of the petitioners had or used any type of implement other than Mr. Maher's use of the rolled placard (see T. 297).[8]

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[8] Several policemen claimed that petitioners Kunis and Eckhardt, who worked together as puppeteers and brought with them a puppet symbolizing anti-militarism, ran into the street after the order to disperse and lay down in the middle of Broadway (T. 127-128, 98-99). The petitioners testified that Kunis lay on the sidewalk and entirely denied the allegation as to Eckhardt (T. 354-355, 392, 407, 421-423). The *Times* reporter testified that he was "not sure if it was on the street or sidewalk" that he saw a person lying (T. 305).

Presentation of Federal Questions in State Courts

The amended remittitur of the New York Court of Appeals, the State court of last resort, states: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated" (*infra* A-2). The points listed by the Court were presented to it in petitioners' briefs and oral argument.

As to the lower State courts, the first point presented to this Court for review—that petitioners were convicted for acts that had not been charged against them—was raised repeatedly in objections to the introduction of evidence in the trial court (T. 39-40, 53, 103-104). Thus, petitioners' attorney objected

> "to any testimony as to the occurrences after Captain McAllister attempted to disperse this meeting, on the grounds that they are not within the allegations of the complaint. It would be a violation of due process to try people on charges which have not been alleged and which they have not had notice and are not included in the sworn complaints . . . " (T. 103-104).

And in argument to the trial court at the conclusion of the trial, counsel stated:

> "Again, at the risk of repetition, I want to say that the complaint is obviously based on the conduct of the whole group. There is no implication in these charges whatsoever, that there would be any attempt to prove . . . or that there would be any evidence about individual physical acts, as to which testimony has been admitted; . . . therefore there can be no conviction based on those acts consistent with due process of law" (T. 500).

In the lower appellate court, the Appellate Term of the Supreme Court of the State of New York (hereinafter called Appellate Term), petitioners' briefs presented the point as a matter of State and Federal due process. One judge rejected it *sub silentio* (A-16 *infra*); one judge may or may not have considered it (A-33); and the dissenting judge accepted this Constitutional argument, relying on the decisions of this Court as to Federal due process (A-37).

The second question presented for review here—that the convictions violate the guarantees of freedom of speech and assembly—was argued to the trial court. Petitioners' attorney asserted that "conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech and free assembly" (T. 487) and quoted at length from this Court's decisions under the Fourteenth Amendment, in particular *Edwards* v. *South Carolina*, 372 U. S. 229 (T. 495). The Federal Constitutional point was presented in brief and oral argument to the Appellate Term; the Court's opinion explicitly

rejected it (A-23-25) and the dissenting opinion explicitly accepted it (A-35-38).

The third Constitutional question, as to the vagueness of the statute, was presented by brief in the Appellate Term, which rejected it (A-15-16).

Reasons for granting the writ: the State courts have decided Federal questions of importance to the maintenance of due process and freedom of expression, in a manner contradictory to this Court's decisions.

I.

The State courts refused to abide by the principle that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge* v. *Oregon*, 299 U. S. 353, 362. See also *Garner* v. *Louisiana*, 368 U. S. 157, 164; *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Cole* v. *Arkansas*, 333 U. S. 196, 201. In *DeJonge*, due process limited the courts to consideration of the charged act, though there as here the State might have accused the defendant, considering the evidence introduced against him, of other acts violative of the statute under which he was convicted (299 U. S. at pp. 362, 360; Record on Appeal in this Court, pp. 20-31).

Certainly the complaint here gave no notice to petitioners that they were charged with the individual misfeasances subsequent to the dispersal order that predominated in the prosecution testimony, such as hitting a police horse or lying in the street.[8a] Rather, as the dissenting judge in Appellate Term pointed out, the complaint was an "omnibus charge made against all" petitioners for acts

[8a] Compare *Russell* v. *United States*, 369 U. S. 749, 764.

in common during the meeting (A-36), raising the issue of whether they could consistently with the First Amendment be punished for holding the assembly and failing to move on.

Grant of this petition is important because the *DeJonge* principle was here transgressed in ways that this Court has not yet reviewed. In the first place, evidence of acts other than those charged was continually introduced over petitioners' due process objection. If the purported individual misfeasances had been charged in the complaint, petitioners would have been on notice of the need to move for separate trials to avoid confusion and prejudice to one petitioner from the claimed acts of another.

The petitioners apparently were convicted, and their convictions upheld, in whole or part on the basis of uncharged purported acts.[9] Throughout the proceedings however, petitioners have been unable to know definitely of what each was convicted. Concomitant with the basic due process violation, petitioners were deprived at the trial of the clarity in the determination of guilt that is derived from a judge or jury's focus on charged acts. And on their appeals they were deprived of the benefit of the courts' knowledge of the basis of their conviction, with review on that basis (compare *Ashton* v. *Kentucky*, 384 U. S. 195, 198; *Kent* v. *United States*, 383 U. S. 541, 561; *Frank* v. *Mangum*, 237 U. S. 309, 327).

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[9] The trial judge and the Court of Appeals indicated that they viewed these acts as the partial or total basis for conviction, in that they overruled petitioners' due process objection (*supra*, p. 10; *infra*, A-2). And see Appellate Term opinion as to these acts, *infra*, A-19-20.

Grant of this petition is further warranted because the due process violation is here interwoven with First Amendment rights. Just as due process in regard to the certainty and definiteness of a statute is of particular importance when First Amendment rights are at stake,[10] so also is the due process principle here involved. A frequent instrument for arrests arising from expression of unpopular opinion is, as here, an umbrella statute embracing numerous types of violations (e.g., *Cox* v. *Louisiana*, 379 U. S. 536; *Edwards* v. *South Carolina*, 372 U. S. 229; *Ashton*, 384 U. S. at p. 199). Thus, a shift to some other alleged violation under the same statute is a special threat in the First Amendment area, in the event that the original charge comes to appear unsupported or vulnerable to Constitutional challenge (e.g., *Cole* v. *Arkansas; DeJonge* v. *Oregon, supra*). The hazard of asserting First Amendment rights increases if the individual is subject to such an unfair prosecutorial advantage, and if interference with free expression can be justified on the basis of an afterthought, as attempted in the case at bar.

II.

Protection of the minority's right of expression on issues of national importance, requires this Court's consideration of the second point presented for review. The question is whether, as the dissenting judge in Appellate Term asserted, "a fundamental right was suppressed under guise of preserving order" (A-37, *infra*).

Insistence on a showing by the State of a real and substantial inconvenience in other street uses, is the only means

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[10] *Ashton*, 384 U. S. at p. 200, n. 2; *Burstyn* v. *Wilson*, 343 U. S. 495, 505-506.

of preventing discrimination against unpopular causes when assemblies are regulated under a broad statute (compare *Cox*, 379 U. S. at p. 558, and opinion by Mr. Justice Black, at pp. 577-581; *Edwards*, 372 U. S. at p. 236). The petitioners' offer of proof that use of Duffy Square was permitted for popular causes such as bond rallies, was rejected; but in any event, it would be difficult to prove that a meeting by a minority was prohibited under precisely the same traffic conditions as a popular assembly was permitted. Political dissent must therefore rely for equal protection upon enforcement of the principle that the State must refrain from suppressing expression unless it causes a real and substantial interference with other uses of the street.

Here this standard was decimated. The only judge who explicitly ruled that the order to disperse was reasonable, upheld it merely on the basis of the general power of the State to prevent disorder "in heavily-trafficked areas where vehicles and pedestrians are or may be obstructed" (*infra*, A-23-24).[11]

Because the meeting was held four or five blocks from Times Square,[12] the Appellate Term opinion emphasized, as have the prosecution briefs, the sentence in this Court's *Cox* opinion that one could not "contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour . . . " (A-25). But this Court did not mean, as is apparent from *Cox* itself (see 379 U. S. at p. 548, n. 12; p. 550), that controlling principles as to First Amendment rights can be abandoned and that un-

[11] The trial judge gave no indication of whether, or what, inconvenience in the use of the streets justified the order to disperse.

[12] While "Times Square" itself is a block occupied by a building, the surrounding area is sometimes referred to by that name.

popular meetings—either for civil rights in the South or "leftist" views in the North—can be relegated to inconspicuous locations, with the conspicuous reserved for popular causes. Under this Court's opinions, the right to dissent is the right to try to persuade others, so long as the dissenters cause no substantial inconvenience in other street uses.

The testimony of the *New York Times* reporter, the only disinterested witness, that the meeting was peaceful, orderly, small relative to the dimensions of the open and unused section of the Square, posing no threat or inconvenience and indeed attracting little attention, stands without any substantial contradiction. As the dissenting judge in Appellate Term said: "No one had indicated any purpose other than by word of mouth to draw attention to the sponsors' opposition to the Viet Nam war. All was peaceful—neither pedestrian nor vehicular traffic had been perceptibly slowed—certainly neither was halted" (*infra*, A-34).

Assuming the credibility of the prosecution testimony that auditors and pedestrians stood or walked in the street bordering one part of the Square, the order to disperse was nevertheless unjustifiable. If the police in good faith had been concerned with this alleged traffic situation, they could have easily, and doubtless would have, ordered a slight narrowing of the gathering on the Square—considering the large cleared area available and the entirely peaceful character of the assembly prior to the advent of the horses (compare *Edwards*, 372 U. S. at p. 232, n. 5). Under this Court's doctrines, a measure less suppressive of First Amendment rights than the drastic order to disperse, should have been given; a slight irregularity in traffic condi-

tions, of a type commonly tolerated or regulated, cannot be used to justify suppression of minority opinion.

Since the meeting was a lawful exercise of First Amendment rights and the order to disperse unconstitutional, the State cannot punish the petitioners' failure to obey it. See *Shuttleworth* v. *Birmingham*, 382 U. S. 87; *Henry* v. *City of Rock Hill*, 376 U. S. 776, 777; *Cox, supra*, 379 U. S. at pp. 543-544; *Edwards, supra*, 372 U. S. at p. 233.

Assuming *arguendo* that petitioners' acts following the dispersal order are in issue, this Court's review of whether they fall within the protection of due process and the First Amendment seems essential. What the Appellate Term opinion characterizes as "inciting to disorder" and "generally causing bedlam" (A-19, *infra*), were petitioners' reasonable efforts to continue their meeting. The police did not permit petitioners merely to stand their ground and submit to arrest; the "commotion which inevitably ensued was the result of the gratuitous and forcible invasion of the rally by the police—not the conduct of the defendants . . . the efficient, moving cause of any disturbance was the unlawful police action" (A-36, *infra*, dissent in Appellate Term). If charges can be leveled on the basis of reasonable efforts to continue a lawful meeting and of reactions occasioned by police methods of enforcing an order to move on, a new method of frustrating First Amendment rights will be initiated.

CONCLUSION

It is respectfully submitted that this petition should be granted.

Respectfully submitted,

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July, 1966

APPENDIX

APPENDIX

Judgment of the Court of Appeals of the State of New York

People of the State of New York against William Turner and others.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

Whereup the said Court of Appeals having heard this cause argued by Nanette Dembitz, of counsel for the appellants and by Mr. Frederick P. Hafetz, of counsel for respondent, and after due deliberation had thereon, do order and adjudge that the judgment herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

June 2, 1966

Amendment of Remittitur by New York Court of Appeals

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

[SEAL]

July 7, 1966

Judgment of Appellate Term of the Supreme Court, First Department, dated November 12, 1965

Present: Hon. Louis J. Capozzoli, J.P.
" " Samuel H. Hofstadter (dissenting)
" " William C. Hecht, Jr., Justice

May #145

The People of the State of New York,

Respondent,

vs.

William Turner, et al.,

Defendants-Appellants.

An appeal having been taken in this Court by William Turner, et al., the defendants appellants, from a judgments of conviction by Hon. Vincent R. Impellitteri, a Judge of the New York City Criminal Court, upon the charge of violating §722, subs. 2, 3 & 4 of the Penal Law, entered on the 2nd day of October, 1964, and said defendants appellants having been sentenced by Hon. Samuel J. Ohringer, a Judge of said Court on the 18th day of November, 1964, as follows:

> Defts. Maher, Laub, Rhoads, Ostrow, Shallitt, Copeland and Teahan $25 or 5 days. Remaining defendants suspended sentences. Sentences of all defendants except Maher, Laub and Copeland, suspended and the said appeal having been heard and the deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgments so appealed from be and the same are hereby affirmed.

Enter

L. J. C.
Justice Appellate Term
Supreme Court, First Department

Opinions in Appellate Term, Supreme Court, First Department

HECHT, J.:

The convictions all spring from a public meeting held by the so-called "May 2nd Movement", an organization formed at Yale University in March, 1964, for the purpose of protesting American involvement in the war in Viet Nam. The meeting was held in Duffy Square, an island located at the intersection of Broadway and Seventh Avenue and bounded by 46th and 47th Streets.

The prosecution's witness, Detective Behr, testified that on August 8, 1964, at approximately 4:00 P. M., the defendant Laub "mounted the steps on the southern end of the statue" located in Duffy Square and proceeded to speak through a "battery-powered megaphone" which provided loud amplification. The witness added:

> "He (Laub) stated that the May 2nd movement had called this meeting and then proceeded to introduce Mr. Philip Luce, whom he stated would be the chairman for this meeting. Mr. Luce began to speak. At this point, representatives of the Police Department, a captain and an inspector, spoke to Mr. Luce, Mr. Laub, Mr. Maher, and, I believe, also Mr. Copeland.
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> "The police captain informed Mr. Laub, Mr. Maher, and Mr. Mopeland [sic], and Mr. Luce, that at the present time the demonstration was interfering with pedestrian and vehicular traffic; that people had to walk into the street to get by."
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> • • • • • •

"That in view of this interference with pedestrian and vehicular traffic, that the meeting would have to be terminated at this location at this time.

"Mr. Laub then took the battery-operated megaphone again and put it up to his mouth and proceeded to speak into it and spoke to the people assembled there. There were approximately two hundred people assembled there. He stated to them that this captain—I believe he stated, 'The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here.'

"Then he informed the people that in spite of this, they would continue their demonstration and he again gave—I believe he gave the megaphone to Mr. Copeland—no, to Mr. Luce, again. Mr. Luce then continued to speak and introduce Mr. Vincent Copeland. Mr. Copeland spoke into another battery-operated megaphone which he carried. He spoke to the people there, speaking of the crimes of American imperialism against the working people."

The captain again told the four above-named defendants that the demonstration interfered with pedestrian and vehicular traffic and had to be terminated, and again the defendant Laub announced his defiance of this request.

Behr further testified that in the area surrounding the Square there were approximately 4,000 to 5,000 people. Pedestrians "were forced to go into the street to walk around the people assembled * * * for the demonstration" and cars veered sharply right on Broadway and left on Seventh Avenue "to avoid persons who were in the street walking north and south around the demonstration". Some

of the demonstrators, including some defendants, were in the street. There was chanting and shouting ("Let him speak") and drums beating and the defendant Maher struck a police horse with a rolled-up placard. There were 15 or 16 police officers present, two of whom were on horseback. Some pedestrians complained to the police of having to walk in the streets. "There was a lot of shouting going on" but Behr did not know which of the defendants were shouting or what they were shouting prior to the police captain's order to disperse.

Patrolman Koopman testified that after the second command was defied by Laub:

> "• • • the captain directed the ten patrolmen and one sergeant, who were across the street, to come over and disperse the crowd and also the two officers on horses and they came to the crowd from the Seventh Avenue side and they started telling everybody to disperse and at that time—then the horses came on behind the foot patrolmen and then Mr. Maher ran past me and ran over to one of the horses and started smacking it with some kind of a sign, or something. I don't know what he was hitting it with. That's when everybody started shouting and yelling and running."

As a result of the commotion on Duffy Square, a crowd was caused to collect, numbering approximately 2,000.

Officer McNulty testified that defendant Meisner "was running around • • • calling to others, shouting that they did not have to leave; that they could stay". The officer told Meisner, "he must keep moving and not to try to encourage these people to stay any longer. He continued to shout that this is America" and was then arrested. De-

fendant Jerome was told to "move away" after he was observed "running from one group to another around the park", behind a mounted policeman who was attempting to disperse the crowd, and shouting that the demonstration was lawful and "the fascist police had no right to stop them". Jerome refused to move and was arrested.

Patrolman Engelhardt testified that he arrested the defendants Shallit and Chadwick. Miss Chadwick "was standing on the sidewalk yelling" to officers who were attempting to remove the defendant Kunis after he lay down in the street, "Leave him alone facists [sic]". Chadwick then sat down on the sidewalk herself, refused to get up, and when the officer "went to pick her up * * * she started punching me and went to bite me". Defendant Shallit was shouting to the demonstrators not to move, calling the police "fascists" and shoving and pushing officers.

Patrolman Coffey testified that defendant Rhoads was screaming and running, and when he refused to leave the Square, he was arrested. As the officer was taking Rhoads to a commandeered cab, "Ostrow came over and told me to leave the defendant (Rhoads) alone"—he (Ostrow) was screaming "fascist cop" and was told to be quiet or he would also be arrested. He refused and was arrested.

Patrolman Campbell testified that after Captain McAllister spoke to Laub about dispersing, Laub, through the megaphone, told the crowd not to break up and called the police "fascist cops". The officer asked Laub "to move off the sidewalk", Laub refused and was arrested.

Officer Hines testified that defendant Copeland spoke to the crowd through a megaphone and "was going back and forth across Duffy Square". Copeland was asked if he had a permit for use of the megaphone, claimed he did

not need one, was ordered to leave the area, refused, and was arrested.

Patrolman Fahy testified that defendant Kunis was "yelling and screaming 'fascists, police brutality, gestapo' ", was told to stop or be arrested, ran "into the middle of Broadway and laid down", refused to move, causing traffic to back up, and was arrested and carried to a radio car. Defendant Eckhardt was also "lying" in Broadway, refused to get up, and was assisted to his feet and then arrested.

Patrolman Knoll testified that defendant Gelles was standing on the sidewalk with two others, was told he was blocking traffic and should move, ranted at the officer about "fascist cops", refused to move on, invited his own arrest, and was arrested. The officer was placing Gelles in a cab when he saw the defendant Kyllingstad slap a police sergeant with whom she had been "loudly conversing". She was then arrested.

Patrolman Walsh testified that he arrested the defendants Apter, Martin and Teahan. Apter was running back and forth from street to sidewalk telling the crowd not to obey the police orders, was told to desist, continued his shouting to the crowd, and was arrested. He then threw himself on the ground and, as the officer tried to put him in a cab, defendants Martin and Teahan intervened and attempted to take Apter away while yelling "Police brutality * * * gestapo". They were warned to move away or be arrested, refused, and were arrested.

Upon cross-examination, Officer Walsh testified that in his opinion there were "about 250 to 300" people present at the demonstration, traffic was stalled because "at intervals the crowd would keep running back and forth into the street with placards * * * so, we attempted to get them back on the sidewalk, to put the traffic through".

Patrolman Annitto testified he arrested the defendants Maher and Turner. Maher was "running around * * * waving a placard. He struck a police horse with the placard" and was arrested. "Turner was screaming and hollering and trying to keep two policemen from keeping the prisoner they were trying to bring to the car".

Defendant Philip Luce, the first witness called by the defense, testified that he arrived at Duffy Square on August 8, 1964, at approximately 3:45 P. M. He was an organizer and leader of the meeting and about 10,000 leaflets had been distributed around the city announcing the meeting. Before the speeches started, Luce and some others present were told by a uniformed policeman:

> "* * * that we could not hold a meeting there; that there was a ban on demonstrations in Times Square; that we could move either north of 59th Street or south of 40th Street and hold a meeting; but that no meetings would be allowed within that area."

Luce further testified that about 20 or 25 people were given identifying arm bands and were placed around the perimeter of the Square "in charge of keeping the crowd orderly" and preventing people from going out into the street. About 100 to 150 people were gathered at the Square for the speeches. Laub opened the meeting by stating it would be "a peaceful, orderly meeting", introduced him (Luce) and he spoke briefly on behalf of the "May 2nd Movement". Luce then turned over the meeting to Copeland. The people assembled did not push, shove, fight or carry weapons. "The entire assembly" was on the Square, not on the street, and there was no interference with vehicular traffic. After Copeland had spoken for 15 or 20 seconds, a police officer

informed them that the meeting was illegal and had to be terminated. Copeland continued speaking and Laub then repeated the officer's command to the crowd. There was no disturbance until suddenly about 12 foot police appeared and two mounted police rode into the crowd and arrests were made.

Upon cross-examination, Luce testified that he, Laub, and Copeland used the megaphone and it was possible that some people were on the street as well as the sidewalk.

Joseph Lelyveld, a New York Times reporter, was called for the defense and testified that he arrived at Duffy Square shortly before 4:00 P.M. and none of the demonstrators had yet arrived. About 15 minutes or half an hour later, people with signs arrived, some distributing leaflets, and the speakers, standing on the steps, began the proceedings. There were no more than 60 people listening and they were all compactly on the sidewalk of the Square. The situation became chaotic after the police requested the crowd to disperse, and several people started speaking at once, protesting the police order and announcing defiance of it, after which the police moved in. The witness did not think there was any interruption with traffic prior to the police moving in to disperse the crowd. The number of people on Broadway and Seventh Avenue seemed normal for a Saturday afternoon in the summer of 1964.

Upon cross-examination, Lelyveld testified that as the meeting was being dispersed, "traffic was pretty well stopped, because prowl cars were converging on the park and all empty taxicabs were being stopped". The witness saw a girl hit a policeman and a boy lie down and hold himself stiff while being carried into a police car. He did not recall seeing any of the demonstrators on the street although he was unable to observe the entire area.

Defendant Albert Maher testified that he hit a police horse with a rolled-up placard in order to make it shy away and to prevent it from stepping on a person who had fallen to the ground. The witness estimated the size of the gathering at about 100 people.

Defendant Ostrow testified he was given an arm band and designated as a monitor to help maintain order and keep those attending the meeting within Duffy Square itself and not out on the street. He estimated there were between 80 and 100 people present.

Defendant Teahan testified that he saw Kunis lying on the sidewalk (not the street) and then being carried by the police to a car. He alleged he was pushed around by several policemen, finally being pushed into the road in front of a squad car and was then "grabbed" by an officer, who said, "Come along with me" and took him to a commandeered cab, put him in and "proceeded to punch me in the mouth, with two witnesses (defendant Martin and Officer Walsh) present". He denied trying to pull the defendant Apter away from Officer Walsh.

Defendant Martin testified he had come to the meeting to speak, and, after seeing Copeland and Meisner led away by the police, he followed and:

> "* * * was approached by an officer who said, 'Do you want to go too, Bud?' and I could see him only out of the corner of my eye. I reeled a little bit, and he grabbed me under an arm; and another officer grabbed me under this arm; and they carried me to a cab, where the defendant Apter and Patrolman Walsh were already in; and they threw me in the front seat."

Martin denied having interfered with the arrest of defendant Apter, but admitted he "may have" yelled things,

like "fascist police", "brutality", etc. He also denied resisting arrest but claimed he was in severe pain because the police were poking him in the kidneys.

Defendant Apter denied sitting or lying down in Duffy Square. He was a monitor with an arm band, designated to keep order and prevent people from "spilling into the street or obstructing traffic". He admitted he was running around and screaming "fascist cops".

Defendant Eckhardt testified that he had followed defendant Kunis as Kunis was being carried to a patrol car after sitting down on the sidewalk. He was not taken to the car or even touched by the police and was told he was arrested after arriving at the station house. He denied lying down on the street.

Defendant Chadwick testified that she saw defendant Kunis either lie down or sit down on the sidewalk and then lifted and taken to a patrol car by the police. She never saw Eckhardt sit or lie down. She admitted trying to bite Officer Engelhardt but did not believe she punched him.

Defendant Kunis testified that he sat down on the Square. He saw horses "turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people" and "I had no other recourse but to sit down and refuse to cooperate with the people inflicting what I saw upon the crowd". Upon cross-examination, Kunis admitted that "when the police came to take me I went completely limp and laid down"—on the sidewalk, not on the street. His body was in a stiff position while being carried and he did not intend to coopérate with the police.

Defendant Kyllingstad testified and denied that her "actions could have been construed as slapping a police officer". She admitted she struck an officer on the back in the

course of attempting to convince him not to arrest defendant Laub.

Defendant Meisner testified he made no noise prior to the time the police began dispersing the crowd, but then yelled, "Let them speak" and may have shouted "that they did not have to leave; that they had a right to speak; that that was a constitutional right". He denied having refused an officer's request to leave the sidewalk.

Defendant Turner testified he was not a member of any sponsoring organization but was asked by Laub and agreed to serve as a monitor to "help maintain order, to allow for pedestrian traffic, and to keep people out of the street". He estimated that "possibly 100 people, and no more, were in attendance at the meeting" prior to the arrival of the police. After the order to disperse, the crowd was chanting "Let them speak". He added:

> "Well, the chanting continued for about—no more than a minute and a half, when nothing happened, when the Captain and a few patrolmen who were in a line across the front of the steps left the scene; and, suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square."

Upon this appeal, defendants-appellants argue: (1) that the record fails to show "substantial interference with normal traffic movements" prior to the police order to disperse so that there was no violation of Penal Law, Section 722 and therefore, the order to disperse was without au-

thority and failure to obey it was not unlawful; (2) the order to disperse was an unwarranted interference with appellants' constitutional rights to freedom of speech and peaceful assembly as those rights have been enunciated by the United States Supreme Court; (3) if Captain McAllister's order was based on a general police ban of all meetings and demonstrations in the area, "such a ban over an extensive area for an indefinite time is clearly unconstitutional"; (4) under the circumstances, both the meeting and appellants' failure to obey the order to disperse were constitutionally protected conduct; (5) evidence of any of the appellants' conduct following their refusal to obey the order to disperse may not be considered in support of their convictions; and (6) subdivisions 2, 3, and 4 of Penal Law, Section 722, as applied to street meetings, are so vague and uncertain as to be violative of due process of law.

Firstly, let it be said that the evidence in the record of a general police ban on meetings in the area is, at best, very sketchy and would clearly be an insufficient basis upon which to premise the prosecution's case.

Secondly, although the prosecution introduced evidence that Duffy Square was technically a "park" and that Park Department Regulations require a permit for public meetings, it is clear that such evidence was not subsequently relied upon in any fashion and is not urged as a basis for sustaining the convictions here. This aspect of the case will not be considered.

Thirdly, while subdivisions 2, 3 and 4 of Penal Law section 722 contain terms which are general and may be subject to differing interpretations, it need not follow that

they are, therefore, too vague and indefinite to adequately provide guide lines for appropriate and inappropriate conduct at street meetings. The provisions of these subdivisions have been many times the ready subject of reasonable construction and application to public behavior, oftentimes proscribing it, while frequently rejecting, as unlawful, its inhibition (see e.g., People v. Bogin, 248 N.Y. 530; People v. LoVecchio, 185 Misc. 197; People v. Hussock, 23 N.Y.S. 2d 520, cert. den. sub. nom. Hussock v. New York, 312 U.S. 659).

It should be noted that it is unquestioned that evidence of a violation of any subdivision of section 722 of the Penal Law will support a conviction thereunder, regardless of whether the complaint charges a defendant under one particular subdivision or another (People v. Carcel, 3 N Y 2d 327, 331; People v. Hipple, 263 N.Y. 242, 244). Such being the case, the convictions would be proper if based on proof of conduct violative of any subdivision and it is clear that the trial court may have convicted certain defendants on the basis of conduct after the police order, and others for their conduct prior thereto. There is therefore no substance to the contention that conduct after the order may not be considered because the trial court may have found certain defendants guilty without proof of any such conduct. Further, there is ample in the wording of the complaint to justify sustaining the charges by evidence of conduct after the order. The complaint charges unlawful congregating, obstruction of pedestrian and vehicular traffic, noisiness, causing a crowd to collect, and a failure to follow the police order to disperse. Clearly defendants' conduct after the order is material and proper in showing the failure to obey it. I believe such proof to be proper

within the charges for violations falling under subdivisions 2 and 4 also.

We come then to the heart of the case—the lawfulness of the defendants' conduct and the appropriateness of the police command. Treating initially the charged violations under subdivision 2, our Court of Appeals has frequently weighed the nature and effect of a defendant's conduct as judged by the standards of this provision of Penal Law, section 722. As stated by the Court (per Burke, J.) in People v. Carcel, 3 N Y 2d 327, at pages 331, 332:

> "• • • The common-law definition of 'breach of peace', though not controlling, is helpful in ascertaining the nature of the acts proscribed by the statute. In *People* v. *Most* (171 N.Y. 423, 429) it was defined as a 'disturbance of public order by any act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.' (See *People* v. *Perry*, 265 N.Y. 362, 364; *People* v. *Pieri*, 269 N.Y. 315, 322; *Cantwell* v. *Connecticut*, 310 U.S. 296, 308.) Guided by this definition, the courts have indicated that *something more than a mere inconveniencing of pedestrians* is required to support a conviction under subdivision 2. As was stated in *People* v. *Nixon* (248 N.Y. 182, 187-188), 'Men and women constantly congregate or walk upon the streets in groups, quite oblivious of the fact that in some degree they are thereby causing inconvenience to others using the street. A public meeting may have aroused such interest that groups of men and women continue the discussion while walking up and down the street. Groups linger in quiet social converse after the religious edifice where ser-

vices have been held is emptied. School children and college youths, laborers, athletic "fans" and church members, perhaps even judges, do at times congregate or walk upon the streets in numbers sufficient to cause other pedestrians to stand aside or step into the roadway. Surely such conduct is not always "disorderly" and does not always tend to a breach of the peace.' In the *Nixon* case it was held that there was insufficient evidence to warrant a conviction under subdivision 2 of section 722, although it was shown that the 20 defendants were parading on a New York City street 4 abreast on a sidewalk only 12 feet wide. 'The regular amount of traffic was just barely getting through' (p. 185) and the obstruction caused by the pickets was such that some people were caused to enter the roadway to pass. Certainly the evidence against defendants in the case at hand was no more impressive than that offered by the People in the *Nixon* case. There is absolutely no showing here that defendants caused any *serious* annoyance to pedestrians or that their manner was threatening or abusive. Indeed, the only evidence upon which the conviction might be predicated was the arresting officer's simple statement that, the defendants 'were blocking the pedestrians' right of way'. That evidence we hold to be insufficient (*People* v. *Nixon, supra; People* v. *De Cecca,* 6 Misc 2d 213; *People* v. *Kieran,* 6 Misc 2d 245; *People* v. *Barisi,* 193 Misc. 934, 935; *People* v. *Lo Vecchio,* 185 Misc. 197)." (Emphasis supplied.)

It is difficult to precisely define just how "serious" the annoyance or interference must be and the evidence did not clearly establish which, if any, of the defendants could be

deemed in violation of this subdivision (2) prior to the order to disperse, but the testimony of the arresting officers, apparently deemed credible by the Trial Court, reciting the individual defendant's conduct after the order, would, in my view, abundantly support the convictions under subdivision 2 of all save perhaps Laub and Copeland. Kunis, Chadwick, Eckhardt and Apter all lay down or sat down; all but Eckhardt were yelling and screaming and inciting to disorder. Meisner, Jerome, Shallit, Rhoads, Ostrow, Gelles, Kyllingstad, Martin, Teahan, Turner and Maher were running about interfering with police officers, shouting and screaming and generally causing bedlam. All these defendants clearly acted "in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others".

For me, it would be difficult, if not impossible, to justify this conduct even were it determined that the police order was improper and without lawful authority. While it is clear that "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" (Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776), there is no support for the proposition, seemingly advanced here, that if the order were improper, any and all of defendants' subsequent conduct would be cloaked with an immunity to arrest. I do not believe the order to be improper, but quite aside from the import of a refusal to obey that order (a violation of subdivision 3 discussed *infra*), the defendants are properly chargeable with the nature and consequences of their acts. Even a completely unlawful police arrest will justify only "reasonable resistance" (People v. McNeil, 15 N Y 2d 717). An unlawful arrest would afford a defendant

> "the right to resist and use 'force and violence' against the officer 'in preventing or attempting to prevent an offense against his person' provided such 'force or violence used [was] not more than sufficient to prevent such offense' (Penal Law, § 246, subd. 3)" (People v. McNeil, 21 A D 2d 1, 2, affd. 15 N Y 2d 717).

But this does not sanction the conduct set forth here in defiance of a police order to disperse—not in defiance of an unlawful arrest and, in fact, prior to any arrest. Most emphatically, it cannot justify the conduct of those who sought to protest the arrests of others. There were no arrests made before the defendants conducted themselves in the manner set forth above and not before all of them were repeatedly warned to desist (cf. People v. Nixon, 248 N.Y. 182, where the arrests were made without warning). This is simply not a case where the convictions depend upon the conduct of the defendants in resisting an unlawful arrest (cf. People v. Cherry, 307 N.Y. 308).

In People v. Sara E. Penn et al, Appellate Term, February, 1964, No. 45, affirmed 16 N Y 2d 581, motion for reargument denied —— N Y 2d ——, September 30, 1965, this Court upheld convictions under subdivisions 2 and 3 based upon (1) the defendants' conduct in darting and sitting in front of and under trucks, thereby interfering with their movements and causing them to stop, and (2) the defendants' refusal to move when ordered to do so by the police. As was stated in the majority opinion in Penn:

> "While it is true that the Supreme Court of the United States has held that public grievances are within the constitutional protection of the First Amendment, it has also held that the manner of protest

is subject to reasonable regulation and control in the interest of public safety and order. (Cox v. New Hampshire, 312 U.S. 569; Giboney v. Empire Storage Co., 336 U.S. 490; Cantwell v. Connecticut, 310 U.S. 296). Also see: People v. Galamison, 43 Misc. 2d 72; People v. Martin, 43 Misc. 2d 355.

"In Cox v. New Hampshire, supra, at p. 574, The Court said:—

" 'Civil liberties as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * *'.

"In Giboney v. Empire Storage Co., supra, at p. 498, the Court said:—

" 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to * * * conduct in violation of a valid criminal statute. We reject the contention now. * * *'.

"In Cantwell v. Connecticut, supra, at p. 308, the Court said:

" 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. * * * '."

See also Schneider v. State, 308 U.S. 147, where the Supreme Court struck down unconstitutionally restrictive ordinances against the dissemination of information or opinion but stated at pages 160-161:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all

traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

In the instant case we have no attempt to improperly limit opinion or its public expression. This was no effort to restrict, unconstitutionally, freedom of religion or dissemination of religious views (Cantwell v. Connecticut, 310 U.S. 296); nor to discriminate between conformist and nonconformist views; nor was there evidenced any form of prior restraint (cf. Burstyn v. Wilson, 343 U.S. 495; Kunz v. New York, 340 U.S. 290; Niemotko v. Maryland, 340 U.S. 268; Saia v. New York, 334 U.S. 558; Rockwell v. Morris, 12 A D 2d 272, pp. dism. 9 N Y 2d 791, cert. den. 368 U.S. 913). The conduct of the defendants here may not be properly likened to peaceful picketing and, as was noted in the dissenting opinion in *Penn*, the defendants there had not impeded street traffic and they had demonstrated in a private driveway rather than a public street—facts cogently different from those presented here.

Further, as stated above, I believe the police order to have been proper. Our state courts have upheld *reasonable* action of the police in seeking to disperse street meetings in areas where a breach of the peace or possibility of disorder may arise—especially in heavily-trafficked areas where

vehicles and pedestrians are or may be obstructed (People v. Feiner, 300 N.Y. 391; People v. Hipple, 263 N.Y. 242; People v. Kunz, 205 Misc. 316; People v. Friedman, 14 N.Y.S. 2d 389). The police, in performing their duties,

> "* * * may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder. Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful" (People v. Nixon, 248 N.Y. 182, 188-189).

See also, People v. Galpern, 259 N.Y. 279, 281. As was most aptly stated by the United States Supreme Court in the recent case of Cox v. Louisiana, 379 U.S. 536, at pages 554-555:

> "* * * the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red

light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting *in the middle of Times Square* at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement." (Emphasis supplied.)

In sum, it is my view that the police request to disperse was made in the line of a "duty and responsibility to keep their streets open and available for movement" (Cox v. Louisiana, supra, p. 555), but even if the order were unnecessary or improper, the subsequent conduct of the defendants would nevertheless be unjustified and violative of subdivision 2.

In view of the general police order which was announced to the assemblage, it would seem plausible that all defendants would appropriately be charged with a violation of subdivision 3 of Penal Law, section 722. There is, as well, testimony in the record of specific refusals to obey the order of an arresting officer in the case of all defendants excepting Kyllingstad, Maher and Turner. What then of the propriety of the convictions under this subdivision? Contrary to appellants' assertion, subdivision 3 would not, by its terms, "prohibit all street meetings". It requires both that defendant "congregates with others" and "refuses to move on when ordered by the police". There must be a showing of an actual or potential breach of the peace together with a congregating and refusal to obey the police order. Although those congregating may do so in an orderly and inoffensive way, in the absence of a showing that the police direction "was purely arbitrary and was not calculated in any way to promote the public order", the refusal to obey

violates the statute (People v. Galpern, 259 N. Y. 279, 284-285).

Have recent Supreme Court decisions rendered untenable the interpretation thus placed on subdivision 3 by our State courts? I think not. Appellants rely heavily on Edwards v. South Carolina, 372 U.S. 229, and Cox v. Louisiana, supra, but analysis of the holdings there does not compel a determination that subdivision 3 is unconstitutional either on its face or as here applied.

In *Edwards,* 187 students, protesting discrimination, marched to the grounds of the State House in Columbia, South Carolina. They marched around the grounds, carrying placards, for approximately 45 minutes, and

> "• • • As they entered, they were told by the law enforcement officials that 'they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful.'"

Some 200 to 300 spectators had gathered to observe the march and "nobody among the crowd actually caused or threatened any trouble" (372 U.S. at 231). Most importantly "[t]here was no obstruction of pedestrian or vehicular traffic within the State House grounds • • • [a]lthough vehicular traffic at a nearby street intersection was slowed down somewhat [and] an officer was dispatched to keep traffic moving". The police authorities then advised the group that there would be arrests unless they dispersed within 15 minutes.

> "• • • Instead of dispersing, the petitioners engaged in what the City Manager described as 'boisterous,' 'loud', and 'flamboyant' conduct, which, as his later

testimony made clear, consisted of listening to a 'religious harangue' by one of their leaders, and loudly singing 'The Star Spangled Banner' and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail." (372 U.S. at 233).

The Court, in reversing convictions based on a breach of the peace under State law, specifically stated:

"We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell* v. *Connecticut,* 310 U.S. 296, 307-308; *Garner* v. *Louisiana,* 368 U.S. 157, 202 concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not suspectible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection."

In other words, the thrust of the Court's holding, under facts markedly dissimilar from those with which we are

confronted, was to vitiate a statute which was aimed at and employed for the purpose of inhibiting, by means of criminal sanction, "the peaceful expression of unpopular views". We have no such case here. There is no claim, nor could there be, that either the statute here involved or the police action taken was meant to restrict the expression of views, popular or unpopular. There is no discriminatory application alleged. Our determination is clearly made by means of "evenhanded application" of a regulatory statute which, reasonably construed, is meant to insure maintenance of order by "limiting or proscribing" certain conduct.

The opinion in *Edwards* specifically pointed out that the fact situation there presented "was a far cry from the situation in *Feiner* v. *New York,* 340 U. S. 315", where the Supreme Court last had an opportunity to interpret and pass upon the validity of subdivision 3 of Penal Law, section 722. In *Feiner,* the petitioner had been convicted in the Syracuse Court of Special Sessions for a violation of Penal Law, section 722, subdivisions 1, 2 and 3. His conviction had been affirmed in the New York Court of Appeals (300 N.Y. 391) and the Supreme Court granted certiorari to determine whether "* * * the conviction is in violation of his right of free speech under the Fourteenth Amendment". The petitioner, in March, 1949, had been addressing a street meeting in Syracuse attended by approximately 75 or 80 people "both negro and white, filling the sidewalk and spreading out into the street". He had been referring derogatorily to President Truman, the American Legion, the Mayor of Syracuse, and other public officials. Police officers observed the scene for a while and, after indications of excitement, restlessness and some pushing and shoving, the officers "stepped in to prevent it from

resulting in a fight". Petitioner was three times requested to stop speaking but refused to do so while "the crowd was pressing closer around petitioner and the officer". The officer then arrested the petitioner and brought him down from the wooden box upon which he was standing. The conviction was premised primarily on petitioner's failure to "obey reasonable police orders" (subd. 3).

The Supreme Court, in affirming, stated:

> "We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. • • • They found that *the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions.* Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.
>
> • • • • •
>
> "• • • This Court respects, as it must, the interest of the community in maintaining peace and order on

its streets. *Schneider* v. *State*, 308 U. S. 147, 160 (1939); *Kovacs* v. *Cooper*, 336 U. S. 77, 82 (1949). We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner." (340 U. S. at 319-320) (Emphasis supplied.)

In *Cox* v. *Louisiana*, supra, appellant, a leader of approximately 1500 students who had peacefully demonstrated in the vicinity of the Baton Rouge Court House, against discrimination generally and particularly the jailing of 23 fellow students, subsequently refused a sheriff's order to break up the demonstration as it was about to move uptown to several luncheon counters to protest discrimination there by means of a sit-in. Tear gas dispersed the demonstrators, and the following day appellant Cox was arrested, and later convicted of disturbing the peace, obstructing public passages and picketing before a court house. The Court, in reciting the facts, pointed out that the entire demonstration was orderly and peaceful and there was no obstruction of traffic. There was further evidence that the police had condoned the demonstration at the court house so long as the group remained on the "west sidewalk" and that Cox had kept them there. The only evidence of potential unrest was some "muttering and grumbling" by some whites as Cox spoke of the "illegal arrest" of the 23 students and then asked the crowd to move uptown to the lunch counters and sit in for an hour if they were refused service.

The Court, in reversing the breach of peace and obstructing public passages convictions, specifically held unconstitutional the Louisiana "disturbing the peace" statute (La. Rev. Stat., § 14:103.1), a statute markedly similar to Penal

Law, section 722, subdivision 3, and determined that the case was governed by the holdings in *Edwards* v. *South Carolina,* supra, and *Fields* v. *South Carolina,* 375 U.S. 44, constituting an infringement by Louisiana against Cox's rights of free speech and free assembly. The Court specifically held:

> "• • • Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals, and also that the statute *as authoritatively interpreted by the Louisiana Supreme Court* is unconstitutionally broad in scope" (379 U. S. at 545.) (Emphasis supplied.)

The Court pointed out that the demonstration was "very well controlled" and the group was "orderly" and not, according to the sheriff's testimony, "objectionable" before Cox urged them to move uptown for the sit-in. The record further showed that the singing of the students resulted only in some cheering and applause by their 23 incarcerated fellows and the general mood was never "hostile, aggressive, or unfriendly". The Court found the arrest to be falsely cloaked in the power of the State to protect the public safety and order.

It is my view that the Court, in Cox, deemed the statute involved unconstitutional as it had been interpreted and applied in the State of Louisiana. I do not feel that the decision mandates a finding of unconstitutionality for subdivision 3 of our disorderly-conduct statute. (A reading of the concurring opinions in *Cox* v. *Louisiana,* companion case No. 49 [379 U. S. 559], supports this position.) There is no indication that the implicit upholding of the constitutionality of subdivision 3 in *Feiner* v. *New York,* supra, has

been undermined (cf. language of Mr. Justice Clark, 379 U.S. at 589). Clearly, the application of subdivision 3 to the convictions here involved was not an attempt to suppress unpopular views, but was aimed solely at the maintenance of order and the avoidance of obstruction to vehicular and pedestrian traffic. There is no "unlimited power to order people off the streets", but rather an authority to reasonably regulate to avoid actual or potential breaches of the peace in the public interest. There is no evidence that administration of the statute here has been "otherwise than in a fair and non-discriminatory manner which the State court has construed it to require" (Cox v. New Hampshire, 312 U. S. 569, 577). Finally, it should be noted that the Court of Appeals in affirming this Court's determination in *People* v. *Penn*, 16 N Y 2d 581, was aware of the decision in *Cox* v. *Louisiana*, (see 16 N Y 2d at 582) and specifically held that there was no denial of the defendants' constitutional rights.

I am of the view that subdivision 3, as applied, remains constitutional and that the convictions are valid under both that subdivision and subdivision 2.

The judgments of conviction are affirmed.

CONCURRING MEMORANDUM

CAPOZZOLI, J.:

There is no doubt about the fact that each and every citizen is immune from arrest and prosecution if he engages in a peaceful, orderly and lawful demonstration for the purpose of dramatizing grievances or to call attention to political views. But demonstrations conducted in a disorderly and unlawful manner resulting in deprivation of the rights

of other citizens, are not to countenanced and cannot be justified under the law.

In the case at bar, by virtue of the guilty verdict rendered by the court below, it must be concluded that the court found that the behavior of these defendants, and others, before the police ordered the termination of the meeting, was interfering with pedestrian and vehicular traffic. In view of that fact the police officers were duty bound to protect the public and were acting legally when they sought to end the meeting. (People v. Sara E. Penn, et al., Appellate Term, First Department, February 1964, No. 45, affd. 16 N Y 2d 581.)

Under the circumstances disclosed in the record the conviction was justified and must stand.

DISSENTING OPINION

HOFSTADTER, J.:

I dissent.

The 17 defendants were convicted of disorderly conduct (Penal Law, 722 [2, 3, 4]) under a single, omnibus complaint charging that on August 8, 1964, at 4:25 P.M., they unlawfully assembled at Duffy Square, "obstructing the area to the exclusion of those wishing to use the same" and delayed "vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered [by the police] to move on the defendants did fail to do so, after being informed that their actions were not lawful". None of these charges were established upon the trial, except only the admitted refusal of the defendants to disburse when ordered to do so by the police captain in charge of ten patrol-

men, two mounted officers and a sergeant. Implicit throughout the record is that the police had decided to prevent the meeting before it assembled, though proof of this predetermination was erroneously foreclosed by the trial judge.

On this appeal, the People urged, and my brethren have accepted, as the basis for affirmance, the defendants' defiance of the police order and matters subsequent to it and attendant upon its forcible execution. I cannot agree; for this predicate of affirmance is without validity in divers aspects. The occurrences now offered as a basis for upholding the convictions were not the subject of the complaint charged. And the events, including any alleged disturbance by any defendant, ensuing upon the order, were the direct and immediate issue of a misconception by the police of the lawful warrant and scope of their authority.

The "May 2nd Movement" is a "peace" organization formed at Yale University. At 4 P.M. on August 8, 1964 it undertook to hold a rally at Duffy Square to protest against American involvement in the Viet Nam war. A captain of police ordered the group to disperse within five minutes after a speaker sought to introduce a chairman for the meeting. Nothing of substance had yet been uttered by either. No one had indicated any purpose other than by word of mouth to draw attention to the sponsors' opposition to the Viet Nam war. All was peaceful—neither pedestrian nor vehicular traffic had been perceptibly slowed—certainly, neither was halted.

When defendants refused to terminate the rally, the captain ordered his men on horseback and on foot to disrupt the assembly. Within 20 minutes after its inception, the order was executed; and the defendants were arrested and charged with disorderly conduct.

But, meetings such as this one are fully protected by the First and Fourteenth Amendments (as well as by the State Constitution—Article I, sections 8, 9). "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public; and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (Hague v. C. I. O., 307 U. S. 496, 515; Kunz v. New York, 340 U. S. 290, 293; Cox v. Louisiana, 379 U. S. 536, 555). Before a rally may be dispersed, the speakers must have passed the bounds of argument or persuasion and undertaken incitement to riot (Feiner v. New York, 340 U. S. 315, 321).

Only "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears", may the State interfere with a demonstration (Cantwell v. Connecticut, 310 U. S. 296, 308). Absent these elements, a demonstration may not be arrested (Edwards v. South Carolina, 372 U. S. 229; Fields v. So. Carolina, 375 U. S. 44; s.c. 372 U. S. 522). No such conditions existed during the instant demonstration. Hence, the police were without warrant to proscribe or disrupt it. The order and action thereon had no justification; the resultant disturbance was part of the *res gestae* engendered by them—culpability for which is imputable to the police—not to the defendants.

The orders of the policemen could not make the conduct of the defendants, otherwise lawful, unlawful. "One cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution" Wright v. Georgia, 373 U. S. 284, 291-292; Henry v. City of Rock Hill, 376 U. S. 776; People v. Collins, 44 Misc 2d 430, affd. 16 N Y 2d 554; see also Lombard v. Louisiana,

373 U. S. 267; Shuttlesworth et al. v. City of Birmingham, 373 U. S. 262; Johnson v. Virginia, 373 U. S. 61; People v. Galpern, 259 N. Y. 279, 281). Enforcement of the law must itself be lawful to serve as predicate for criminal charges.

The commotion which inevitably ensued was the result of the gratuitous and forcible invasion of the rally by the police—not of the conduct of the defendants. Confronted with the police assault, defendants could legally do what was reasonably necessary to resist the unlawful aggression (Penal Law § 246[3]; People v. Allen, 15 N Y 2d 558, 559; People v. Dreares, 15 A D 2d 104, affd. 11 N Y 2d 906; People v. Cherry, 307 N. Y. 308). "Lacking the essential warrant, having abused the authority which was their trust, the officers stood bereft of their usual prerogatives" (People v. Cherry, *supra,* at p. 311). In this context, defendants were liable to criminal sanctions only if they pursued a "counterattack merely for the sake of revenge or the infliction of needless injury" (People v. McNeil, 15 N Y 2d 717, 718). The record shows none; indeed, it renders it manifest that the efficient, moving cause of any disturbances was the unlawful police action.

Apart from these considerations, egregious error is compounded by affirmance founded on any alleged disturbance —by *some* defendants—following the dispersal order. Whether, in the case of any defendant, his conduct went beyond permissible protest is not before us, nor was it before the trial court. The complaint was not founded on any such claimed conduct. By it, none of the defendants were charged with assault or physical attack on policemen; none were accused of resisting arrest; none were charged with counterattacking the police. The only omnibus charge made against all—who were tried jointly—was that they

had congregated at Duffy Square illegally; had impeded traffic; had caused a crowd to collect; and when ordered to move on, failed to do so. The evidence utterly fails to sustain this complaint.

It assumed the validity of the unlawful order. This ill-founded assumption taints the entire record. In the main, the evidence adduced on the trial was tangential, if not wholly irrelevant, to the only issue which could be properly agitated under the complaint, i.e.: the conduct of the defendants *before* police intervention. We may not perpetuate its vice here. The complaint was not adequate to sustain the charges upon which conviction was rendered by the trial court nor as the predicate of the offenses now pressed upon us to sustain that judgment.

To charge defendants with one crime and convict them of others is to violate every procedural concept of American jurisprudence. As it is a "violation of due process to convict and punish a man without evidence of his guilt" (Thompson v. Louisville, 362 U. S. 199, 206), "conviction upon a charge not made would be sheer denial of due process * * *. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (De Jonge v. Oregon, 299 U. S. 353, 362, 365.) The convictions here may not stand—they were not based on charges made; and those set forth in the complaint were not substantiated in the evidence.

Stripped of the immediacies, here a fundamental right was suppressed under guise of preserving order. Judged

in the context of the purpose of the rally, defendants' acts were constitutionally protected (Giboney v. Empire Storage Co., 336 U. S. 490). "The holding of meetings for peaceable political action cannot be proscribed" (De Jonge v. Oregon, supra, 299 U. S. 353, 365). Defendants were entitled to their opinions. Right or wrong, they had the constitutional prerogative—and immunity—peaceably to express them without hindrance by the police. "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views" (Edwards v. South Carolina, 372 U. S. 229, 237). Those who wish to disseminate ideas need not present them first to police authorities for their consideration and approval (Cox v. Louisiana, 379 U. S. 536, 557). As Dean Lohman observed recently "Officers must act as impartial referees to prevent violence". They may not resort to the oppressive use of putative law to stifle peaceful protest!

"Compulsory unification of opinion achieves only the unanimity of the graveyard. * * * the First Amendment * * * was designed to avoid these ends by avoiding these beginnings. * * * Authority here is to be controlled by public opinion, not public opinion by authority." (Board of Education v. Barrette, 319 U. S. 624, 641.) Earlier this year President Johnson told 10,000 college students: "free speech * * * free assembly * * * parades * * * and demonstrations * * * are what you and all other Americans need to stand up for today". He recognized that such freedom of speech—in protest—is the *secret* weapon of an *open* society—the well-spring of its vitality. It nourishes the spirit and practice of civility. Men's instinctual violence—in disagreement—is conducted into peaceful channels. And it is salutary for the State in that it serves as a safety valve in times of stress and strain. Cardozo summed it up

as "the matrix * * * of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). But speech, to be potent, must be audible. As I had occasion to point out in another context: "A right which is effective only when not needed, is scarcely a right at all" (The Fifth Amendment and the Immunity Act of 1954, 10 The Record of the Assoc. of the Bar 453).

The convictions should be reversed and the complaint dismissed.

SUPREME COURT U. S.
FILED
SEP 27 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 399

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,
Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Opinions Below

The decision of the New York Court of Appeals, affirming the judgment without opinion is reported at 17 N.Y.2d 829. The opinion of the Appellate Term of the New York Supreme Court is reported at 48 Misc.2d 611.

The Statute Involved

The relevant portions of Section 722 of the Penal Law provide:

> "Disorderly Conduct.
>
> "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> * * *
>
> "2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> "3. Congregates with others on a public street and refuses to move on when ordered by the police;
>
> "4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;"

Questions Presented

Whether Section 722 of the New York Penal Law as applied infringes on petitioners' rights under the First and Fourteenth Amendments of the United States Constitution.

Whether petitioners had fair notice before trial of the scope of the charges against them.

Statement

On a mid-summer afternoon, several hundred persons, including the defendants, inundated Duffy Square, a small islet between bustling Broadway and Seventh Avenue, to protest against the war in Vietnam. Clogging the path-

ways of the Square and spilling into the street, the demonstrators seriously disrupted automobile and pedestrian traffic. Scorning patient pleas of police to disperse, the group defiantly persisted there, perpetuating the obstruction. This refusal to obey the reasonable police commands, clearly constituting disorderly conduct, was, however, merely a prelude to the still greater disruption caused by defendants. When the few officers present summoned additional policemen to help disperse the crowd, defendants erupted into frenzied defiance, hurling the Square into a scene of utter chaos.

Charged with the offense of DISORDERLY CONDUCT (Penal Law §722, subdivisions 2, 3 and 4), petitioners were jointly tried and convicted (IMPELLITTERI, J.) in Criminal Court of the City of New York, County of New York, on October 2, 1964. The next month, on November 18, 1964, petitioners Maher, Laub, Rhoads, Ostrow, Shallit, Copeland and Teahan were sentenced to pay a fine of twenty-five dollars or, in default thereof to serve five days in jail; the remaining petitioners received suspended sentences. On November 14, 1965, the Appellate Term of the Supreme Court, First Department, affirmed the conviction, one Justice dissenting, and subsequently, the case was affirmed unanimously by the New York Court of Appeals.

Petitioners here contend that they were guiltless because their conduct was a constitutionally protected protest meeting. Additionally, they argue that they were not afforded fair notice of the criminal acts charged against them. The claims are totally lacking in merit.

THE EVIDENCE

The People's Case

The scene prior to the police orders to disperse

At about 4 p.m. on Saturday, August 8, 1964, approximately 200 persons were gathered on Duffy Square, a concrete island extending from 46th to 47th Streets between Broadway and Seventh Avenue (Behr 20, 26, Walsh 165, 181, Koopman 210).* Bearing placards, the group loudly chanted "Down with American Imperialism. Stop the war in Vietnam," accompanied by defendant Eckhardt's beating on a large kettle drum; several paper effigies had been set up on a sidewalk portion of the Square by Eckhardt and the defendant Kunis (Behr 25, Koopman 210, 214). Shortly after 4 p.m. the defendants Laub, Luce, Copeland and Maher mounted steps leading to a statue at the northern end of the Square and Laub, through a battery megaphone, addressed the crowd (Behr 20, 26, Koopman 209).

As Laub began to speak, the group "jamming" toward him began "spilling out into the street" (Behr 29, 51, Koopman 213). Automobiles were "veering sharply to the right on Broadway and to the left on Seventh Avenue to avoid" demonstrators in the street—including Eckhardt, Kunis and Kyllingstad—and pedestrians whom the demonstrators, blocking the sidewalks on the Square, had forced into the street (Behr 28-9, Walsh 166, Koopman 213). Thus compelled to walk in the street, pedestrians complained to

* References, unless otherwise indicated, are to the typewritten minutes of the trial.

several police officers present (Behr 43-4). Other "pedestrians couldn't get through the street to the bus stop" on the Square (Walsh 166). On the Broadway and Seventh Avenue sidewalks opposite the Square were approximately 4,000 to 5,000 pedestrians, several thousand stopping to look at the demonstrators (Behr 32, Koopman 211-12, 223).

The orders to disperse and subsequent events

Detective **Fritz Behr** testified that after Laub spoke briefly, introducing the defendant Luce, a police inspector and a police captain approached Laub, Luce, Copeland and Maher at the stairs to the statue (21). The captain informed them that because the demonstration was interfering with pedestrian and vehicular traffic, the meeting would have to be terminated (22-3). Laub then took the megaphone from Luce and told the crowd:

> "The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here" (24).

He then stated that, nevertheless, the demonstration would continue; and he returned the megaphone to Luce who spoke briefly and in turn introduced Copeland (24). Copeland stated that "if everybody stayed there and protested to the utmost, that the police department wouldn't do anything about their meeting" (25).

At this point the police captain again approached Laub, Luce, Copeland and Maher, and repeated his order to disperse (25). Taking the megaphone, Laub again urged the group not to disband (25). The crowd began chanting "Let him speak. Let him speak" (38). The captain signalled

fifteen policemen, including two on horseback, over to the Square (42-3). Behr further testified that the defendant Maher struck one of the horses several times with a rolled-up placard (39).

Patrolman **Henry Campbell** testified that after the captain directed Laub to break up the meeting and Laub urged the crowd to stay, "Then the whole crowd started to run all over the place and they were running in the gutter and on the sidewalks (108-11). Campbell approached Laub on the sidewalk of the Square and told him several times to move on (112-13). Laub refused and was then placed under arrest (113).

Patrolman **Joseph Hines** testified that after the police captain spoke to the defendants at the stairs to the statue, Copeland ran back and forth across the Square with a loudspeaker, calling persons over to him (118-19). He was arrested after he again mounted the steps to the statue and refused to leave the area (119-20).

Patrolman **Donald Walsh** testified that after the police captain told the speakers to break up the meeting, the dedendant Apter began:

> "running from the sidewalk to the street, back and forth, speaking to the crowds, telling them not to obey our orders to get back on the sidewalk and to make openings for pedestrians" (161). Walsh told Apter "Stop telling them this and behave yourself" whereupon Apter ran out in the street, yelling to the crowd "Stay where you are" (162-3).

Placed under arrest, Apter threw himself down on the Square and screamed "brutality, fascist police" (163). As

the officer attempted to get him up, the defendants Teahan and Martin intervened, pulling on Apter and shouting "Police gestapo" (164-5). Told to move on, Teahan and Martin refused, whereupon they were placed under arrest (165).

Detective **Francis Koopman** and Patrolman **Robert Annitto** both testified that after the speakers were ordered to break up the meeting, Maher began running around the Square waving a placard, and when mounted policemen arrived on the scene, Maher attempted to move one of the horses by striking it with a placard (190, 215). Annitto testified that the officer kept the horse under control (191), while Koopman stated that the horse reared up on its hind legs when struck (219-20). Annitto also testified that he observed the defendant Turner standing on the sidewalk in front of two policemen, "trying to keep them" from bringing another of the defendants into a police car (192). Turner was hollering "Leave them alone" and "fascist police" (191-3).

Patrolman **George Knoll** testified that he approached the defendants Gelles and Turner and a third person who were standing close together on the sidewalk of the Square and said, "You fellows can't stand here. You are blocking the roadway and * * * the pathway" (141, 145). Gelles yelled, "Oh, you fascist cops. You think you can get everything and do anything you want" (142). Asked twice more to move on, Gelles refused, and was then placed under arrest (142). Moments later, Knoll observed the defendant Kyllingstad on the sidewalk of the Square "in a very loud conversation * * * with a sergeant" (143). She

slapped the sergeant, whereupon Knoll placed her under arrest (144).

Patrolman **Joseph McNulty** testified that after the conversation between the police captain and the speakers, the defendant Meisner began "running around Duffy Square Park calling to others, shouting that they did not have to leave; that they could stay" (82). McNulty approached Meisner on the sidewalk of the Square and told him to move on, whereupon he refused and was placed under arrest (83-4). After the order to disperse, the defendant Jerome, carrying an American flag, began "running from one group to another, calling to members of the group * * *. As the mounted patrolman would dispose a group, the defendant Jerome, with the flag, would run behind the horse and call to others" (84-5). Ordered to move on, Jerome said "no," and was then arrested (85).

Patrolman **Herbert Engelhardt** testified that after the crowd was told to disperse, he observed the defendants Kunis and Chadwick on the sidewalk being told to move on (92, 96, 98-9). Kunis then "ran out into the middle of Broadway and laid down" (98-9). When policemen tried to move Kunis from the street, Chadwick yelled, "Leave him alone, fascists" (92). Again told to move on, Chadwick then sat down on the sidewalk and when an officer attempted to pick her up, she bit him (93). She was then placed in a patrol car (93).

Meanwhile, the defendant Shallit was moving all over the area shouting, "Do not leave here * * * Come back. We have our rights. Don't give in to the police. They are

fascists they have no rights" (93-4). The witness briefly lost sight of her then "saw her again in front of about five people. She was actually doing most of the shoving and pushing back at * * * police officers trying to move the people back" (94). She was then placed under arrest (94).

Patrolman **Edward I. Fahy** testified that upon observing Kunis standing on the sidewalk of Duffy Square screaming, "fascists, police brutality, gestapo," he told Kunis to leave the area whereupon Kunis "ran out into the middle of Broadway and laid down" in the second lane of traffic (127, 129). Fahy went out to him and told him to get up (127). Kunis "continued to lay there. Traffic was getting backed up" so Fahy, assisted by Patrolman Coffey, carried Kunis' "limp" body into a patrol car (127).

At this point Fahy observed the defendant Eckhardt "lying in the middle of Broadway"—also in the second lane of traffic (128-9). The officer told him that if he did not get up, he would be arrested whereupon Eckhardt threw his arms up and said, "Here I am" (128). Fahy then placed him under arrest (128).

Patrolman **Andrew Coffey** testified that he assisted Patrolman Fahy in arresting Kunis after he had laid down in the street (103). At that time "[T]here was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' " including the defendant Rhoads who was standing on the sidewalk "screaming at the top of his lungs" for five or ten minutes (105-6). Rhoads ran to the statue. Then observing Rhoads run to the statue area of the Square, Coffey followed him and told him to move on

(105). Rhoads refused, the officer repeated his order, Rhoads again refused and was placed under arrest (105). As the officer put Rhoads into a taxicab, assisting the police, the defendant Ostrow came from the Square into the street "yelling 'fascist cop' " and "making a lot of noise" (107). Upon his refusal to be quiet, Ostrow was placed under arrest (107).

The Defense

Phillip Luce testified that he was one of the organizers and leaders of the meeting at Duffy Square (236-8). Somewhere between 100 and 150 people had gathered there. After the introductory speeches a police officer appeared and said that "this is an illegal meeting and has to be stopped immediately. You have no right to hold a meeting in Duffy Square" (242). After the defendant Laub related to the crowd what the police officer had said, they did not move, and Laub continued to speak. Suddenly, two horses rode into the crowd, and the police began arresting those who were gathered on the steps (244).

According to the witness, the group had been absolutely quiet until the police arrived on the scene (257). There had been no diversion or interruption of vehicular traffic, and the entire assembly was in the Square, though it was possible that some people might have been in the street (241-2, 256). Ten thousand leaflets had been printed and distributed around the city, announcing the meeting (318-9).

Joseph Leliveld testified that he is a reporter for the New York Times who had been assigned to cover the meeting at Duffy Square on August 8. When he arrived

shortly before 4 o'clock there was a net-work television car on the scene, but apparently the demonstrators had not yet arrived (282). Then, a group of people with signs arrived and formed into ranks (282). Signs were distributed and leaflets were circulated.

Early in the meeting, at which there were no more than 60 people, Captain McCallister stepped up and asked who had given them permission to hold the meeting in Duffy Square: "And I think his first words were, 'Hold this up. Who is giving you permission?' Something to this effect" (286-7). Using the bullhorn, Laub responded, stating that they did not need permission (288-9). The captain withdrew and after a short while returned, stating that if they did not disperse they would be subject to arrest for disorderly conduct (292). "[A]t that point things got a little out of hand, because a number of people seemed to start making speeches" simultaneously, and "there were a lot of people that were just plain shouting" (292-3, 308-9). When the captain's warnings were not heeded, about a dozen policemen plus two mounted policemen moved into the area and began dispersing the group (294). A majority of the group actually moved out of the area, but about 20 tried to hold their ground. It was this latter group which the police began arresting (294-7, 310-1).

The witness further stated, that although he was not sure, he did not observe any interruption of traffic prior to the arrival of the police on the scene (297-8). Nor did he hear Captain McCallister at any time inform the group that vehicular and pedestrian traffic was being blocked by this demonstration (302-3). He did see a girl hit a police officer with her fists (304).

Albert Maher, a defendant, testified that he had been at Duffy Square to participate in and "speak at a meeting to protest the war being carried on now by the United States in Southeast Asia" (319, 321).

The defendant acknowledged having hit two horses, several times, both with a placard and his hand. He claimed to have done so in order to stop them from going into the crowd (323-4, 326).

Ten thousand leaflets had been sent out to advertise the meeting, and about 100 people were in attendance (329-30). Bullhorns were used to amplify the speakers' voices (330).

Theodore Ostrow, a defendant, testified that he had gone to Duffy Square to attend the meeting (331-2, 335) where about 80 or 100 people had assembled. When he arrived, Miss Shallit handed him a black armband so that he could be identified as a monitor in the demonstration (333). He was to make "sure that the participants in the meeting would stay within the Duffy Square area and would not go into the street; and if any disorders I could handle did break out, I should try to subdue any ruckus or yelling, or what have you" (333-4).

The defendant stated that he was arrested about three or four minutes after the police horses arrived (336). He was maintaining his position in the Square, although moving "to avoid the horses, which were charging in about every direction," when he saw the defendant Miss Kyllingstad being taken half-dragged and half walking" to a patrol car or taxicab (336-7). A personal friend of Miss Kyllingstad, he walked over to the officers and informed

them that she could not be arrested, because she has a young baby (337-8, 341, 342). The officer replied that they would "take care of that later" and the defendant was then shoved backwards towards Duffy Square Park into a group of two or three officers where he was held and then "shoved by them again almost into [his] original position" (338). He was then taken to a taxicab, and placed under arrest (340).

Jeremiah Teahan, a defendant, testified that he had gone to the meeting "to hear what the May 2nd Committee had to say in regard to the foreign policy of the United States in Southeast Asia" (351-2).

Prior to his arrest he had walked to where the defendant Kunis was lying on the ground. The defendants Chadwick and Eckhardt were also there (353). Kunis was carried to a car, where he was joined by Eckhardt (354-5). Teahan "then went down further [and] was pushed away from there by several policemen" (356). Down further, where Copeland was being taken to a squad car, Teahan claimed he was then pushed "out of the way * * * into the street" by Captain McCallister, whereupon a policeman told him to "Get out of the street" (357, 358). Another policeman then pushed him back onto the sidewalk where he stayed until still another policeman asked him what he was doing there. He replied that he was trying to stay away from the horses. "In the confusion, somehow or other, someone pushed" him back into the road, in front of a squad car (358-9). A policeman grabbed him from behind and took him to a taxicab, where the defendants "Key Martin and possibly Apter, had been already along

with Patrolman Walsh" who then "proceeded to punch (Teahan) in the mouth, with two witnesses present" (359).

Key Martin, a defendant, testified that he was at Duffy Square on August 8, "to speak on behalf of Youth Against War and Fascism, at a rally opposing the United States War in Vietnam and opposing what seemed at that time to be the imminent expansion of that war" (366-7).

Because of his concern for his fellow-speakers, Copeland and Meisner, he followed them after they had been led away by the police (367). A minute later, an officer asked if he wanted "to go too" and together with another policeman, took him to a cab (368).

Robert Apter, a defendant, testified that Patrolman Walsh warned him that if he did not move he would be arrested (380, 382). A few seconds later, while he was "urging people to stay there and to re-group and have a peaceful meeting" Patrolman Walsh grabbed him and said, "I told you to move. You are under arrest" (382).

On cross-examination, the defendant acknowledged that he had been running around and screaming, and that after the police would tell people to move on, he would tell them to stay (385-6).

Bruno Eckhardt, a defendant, testified that he attended the meeting in Duffy Square as part of a puppet theatre group (389). Their equipment included a four-head soldier puppet, which was held by two men wearing skull masks, and a big kettle drum, which the defendant played but which he stopped playing when told to by the officer (390).

He had been beating the drum for approximately five minutes in an effort to attract attention (397-8). When his friend Kunis was carried into the patrol car by the police Eckhardt merely followed him, opened the door and sat down next to him (392). It was not until he was in the station house that he learned he was under arrest (391-3).

Joyce Chadwick, a defendant, testified that she is a friend of the defendants Eckhardt and Kunis, and had come to the meeting with them (403-4, 408). She and Kunis were standing on the steps to the south of the statue when the police approached (407). Kunis "walked down, off the steps, onto the sidewalk and sat down on the sidewalk, not in the street" (407).

The defendant acknowledged that she did try to bite Patrolman Engelhardt, but she did not believe she had punched him (410). She further stated that she did nothing after the offiecr told her to move off the steps (412, 416).

Ann Kyllingstad, a defendant, testified that she did strike a police officer on the back. This occurred while the defendant Laub was being placed under arrest (432-6). Several officers had approached her and said "Come on, Miss, if you do not move on you will be arrested" (439).

Arthur Kunis, a defendant, testified that at the time of his arrest he was sitting in the vicinity of the flagpole, on the west side of Duffy Square (418-20). The horses had been "turning in circles around, knocking people all over; and policemen on the horses swinging their clubs at people" (421). Upon witnessing this, the defendant felt that

he "had no other recourse but to sit down and refuse to cooperate." When the police arrived he "went completely limp and laid down" (423). He denied yelling or screaming (430).

Pierre Meisner, a defendant, testified that prior to his arrest he had been shouting (441-6). This occurred during the first speech, by Copeland, and not prior to the arrival of the police (444-5).

William Turner, a defendant, testified that he had been assigned as a monitor at the meeting—at which possibly 100 people were in attendance—to maintain order, allow for pedestrian traffic and keep people out of the street (448-50).

The crowd (including the defendant) had been chanting "Let them speak," apparently determined "to drawn out * * * any further orders" when, after about a minute and a half, the captain left the scene and "suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square" (452-3, 458). The defendant walked up the steps, holding his placard up, saying nothing (453). On several occasions he was moved, but he continued to hold his "placard up to the people to see what I was there for" (454). Finally, he was taken to a car (454-5, 462).

The defendant denied ever screaming "Fascist police" or "Leave her alone" (458).

POINT I

Section 722 of the New York Penal Law as applied does not infringe upon the rights of petitioners under the First and Fourteenth Amendments of the United States Constitution.

Converging on Duffy Square, a small concrete island in New York's busiest intersection, several hundred demonstrators against the Vietnam war clogged the sidewalks and bus stop of the Square and spilled into the street. Automobiles began "veering sharply" (28) to avoid both demonstrators and pedestrians whom the demonstrators had forced into the street. Thus obstructed from the pathways of this slender island refuge at the juncture of the major arteries Broadway and Seventh Avenue, pedestrians complained to several police officers present. At several intervals within a period of ten or fifteen minutes, the officers requested the leaders of the group to disperse the meeting because of the vehicular and pedestrian disturbance. Ignoring these entreaties, the leaders, speaking through megaphones, echoed the police requests and defiantly urged the group to remain; rejoining, the crowd shouted "Let them speak" (38). Meanwhile, several thousand persons collected on the sidewalks of Broadway and Seventh Avenue to view the spectacle on the Square. Finally, their reasonable requests blatantly countermanded, the officers summoned additional policemen to help disperse the crowd.

At this point the defendants precipitated the existing disorder into utter chaos. "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' " (105). Several defendants ran into the

middle of Broadway and laid down, fighting police attempts to get them up. Many, including some with megaphones, ran back and forth across the sidewalks of the Square and into the street urging those heeding the police order to remain, and crying, "fascists, police brutality, gestapo." Some bunched on the sidewalks, adamantly refusing repeated police requests to move on. Others shoved and pushed policemen who were successfully dispersing part of the group, one defendant slapping an officer, another repeatedly striking a mounted horse. As some defendants, already arrested, were being placed in patrol cars, other defendants intervened, gathering on the sidewalk and darting out to the street to rage against the arrests, and in some cases, injecting themselves in the way of the arresting officers.

Unquestionably, defendants' conduct after the police order to disperse constituted disorderly conduct under Penal Law Section 722, subdivision 2:

> "Any person * * * whereby a breach of the peace may be occasioned * * * acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others."

That subdivision proscribes conduct causing "serious annoyance" [*People* v. *Carcel*, 3 N. Y. 2d 327, 331 (1957); see *People* v. *Perry*, 265 N. Y. 362 (1934); *People* v. *Most*, 171 N. Y. 423 (1902)]. Surely, defendants' tumultuous behavior and its chaotic consequences was of this measure. Furthermore, their brazen acts and conflict with the police threatened even more "serious annoyance" than that actually effected by the time of their arrests.

Seeking to justify their acts after the order to disperse, defendants contend that "they fall within the protection of due process and the First Amendment" because they constituted "reasonable efforts" to resist the unlawful police attempt to break up their lawful meeting (petitioners' brief, p. 17). The logic of this proposition, however, is wholly spurious, for, as the Appellate Term opinion* properly discerned, even "if the order were improper, any and all of the defendants' subsequent conduct" would not be "cloaked with an immunity to arrest" [Appendix, p. 19]. Surely a group's efforts in resisting police orders to disperse do not become protected First Amendment activity because the group had previously been engaged in First Amendment activity. Vietnam demonstrators, as well as

> "[c]ivil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. The cause confers no privilege to break or disregard the law." [*Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965) (concurring opinion, Fortas, J.).]

Defendants' tumultuous, disruptive behavior upon being ordered to disperse may hardly be deemed reasonable resistance, and "like all other persons," their lawless resistance is punishable.

Straining further to avoid the consequences of their anarchic behavior subsequent to the police orders to disperse, defendants contend that due process of law was violated by consideration of appellants' individual acts after their failure to obey the dispersal order because such acts were not charged in the complaint. However, the distinc-

* That opinion is set forth in the Appendix to appellants' brief.

tion defendants attempt to draw between their failure to obey the police order and subsequent acts is specious, for, as the Appellate Term opinion observed, the totality of defendants' conduct "after the order is material and proper in showing the failure to obey it" (Appendix, p. 16). For example, after the order to disperse, some defendants sat down on the sidewalk and some lay down in the street. This conduct in itself was the "failure to obey" the dispersal order which defendants concede is properly charged in the complaint. Defendants' attempt to separate the act of failure to move on and these obstructionist acts is sheer sophistry.

Moreover, the language of the complainant, as the Appellate Term properly noted, fully embraces their behavior after the order to disperse. The complaint states that:

> "The defendants did unlawfully congregate and assemble at the above location [Duffy Square] obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful" (6).

Clearly, defendants had fair notice that all of their "obstructions" and "boisterous" acts at Duffy Square were the subject of the complaint. Dispelling any question as to the scope of the complaint is the heading, charging the time in question as "4:25 p.m." This was fully twenty minutes after the first police order to the crowd that they disperse and nearly ten minutes after additional policemen were summoned to the scene (20, 165, 209, 218). Defend-

ants' eruption into riotous behavior, it will be recalled, began when the additional police assistance arrived. Unquestionably, then the complaint adequately notified defendants that they were charged with the full extent of their conduct on the day in question.

Thus, the evidence of defendants' behavior after the police ordered the crowd to disperse clearly established their guilt of Section 722, subdivision 2. However, even assuming, incorrectly, that the full extent of their conduct after the dispersal order was not properly before the trial court, and that only the bare fact of refusal to move on was admissible, nevertheless, defendants' guilt of disorderly conduct was still established—under subdivision 3.

Subdivision 3 provides that one who "congregates with others on a public street and refuses to move on when ordered by the police" is guilty of disorderly conduct. As construed by the New York Court of Appeals, only the refusal to obey a reasonable order is punishable, reasonableness being determined by such factors as "protest from pedestrians who were annoyed by the defendants' conduct" [*People* v. *Nixon*, 248 N. Y. 182 (1928)] and interference with vehicular traffic [see *People* v. *Feiner*, 300 N. Y. 291 (1950); *People* v. *Galpern*, 259 N. Y. 279 (1932); *People* v. *Penn*, 16 N. Y. 2d 581 (1965)]. Unquestionably, the police command to the demonstrators at Duffy Square was reasonable. Choking off the pathways of the Square, they spilled into the street seriously interfering with automobile traffic on Broadway and Seventh Avenue. Additionally, pedestrians complained to police officers present. This serious disruption amply justified the police orders to disperse, and defendants' refusal to obey that reasonable command indisputably violated subdivision 3.

Nor is the reasonableness of the police command diminished by the fact that defendants were at the time engaged in a protest meeting within the protection of the First Amendment. The Supreme Court has consistently held that such use of the public streets is subject to reasonable regulation by the state [*Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569 (1940); *Kovacs* v. *Cooper*, 336 U. S. 77 (1948); *Feiner* v. *New York*, 340 U. S. 315 (1951); *Poulos* v. *New Hampshire*, 345 U. S. 395 (1953); *Cox* v. *Louisiana*, 379 U. S. 550 (1965)]. Indeed, extensively discussing this principle in the last mentioned case, the Court, with remarkable prescience, set forth an example of reasonable regulation virtually identical to the facts of the present case:

> "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. *Nor could one*, contrary to traffic regulations, *insist upon a street meeting in the middle of Times*

Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.'' [*Id.* at 554-5 (emphasis added)].

Thus, but for the distance of several blocks, defendants' assembly was an enactment of the Supreme Court's illustration of street activity properly subject to dispersal by the government.

In addition to defendants' clear violation of subdivisions 2 and 3, their unruly, obstructive gathering, shorn of constitutional sanction, indisputably contravened subdivision 4 of the statute by causing "crowds to collect"—on the Square, the street, and the sidewalks of Broadway and Seventh Avenue [see *People* v. *Lennert,* 291 N. Y. 738 (1943); *People* v. *Philips,* 245 N. Y. 401 (1927)].

Misguided is defendants' heavy reliance throughout their brief on *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), in which the Supreme Court reversed breach of the peace convictions based upon defendants' assembling on State House grounds and refusing to obey police orders to disperse. The Court held that there had been "no obstruction of pedestrian or vehicular traffic within the State House grounds. No vehicle was prevented from entering or leaving the horseshoe area'' [*id.* at 231-2]. In sharp contrast is the indisputable evidence of obstruction in the present case.

Additionally, the demonstrators in *Edwards* were prosecuted for a common law breach of the peace, an offense so indefinite as to permit conviction solely upon proof of the "peaceful expression of peaceful views'' [*id.* at 237]. To

the contrary, the New York statute qualifies the common law designation of breach of the peace by statutory subdivisions "evincing a legislative judgment that certain specific conduct be limited or proscribed" [*id.* at 236]. Subdivision 2 of Section 722 is as precise as the statute upheld in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942), being "narrowly drawn and limited to define and punish specific conduct lying within the domains of state power" [315 U. S. at 573]. And subdivision 3, as construed by this Court to sanction police commands to disperse issued in the face of pedestrian and vehicular obstruction, not "at the whim of any police officer", is unquestionably constitutional [*Shuttlesworth* v. *Birmingham,* 382 U. S. 87 (1965); also see *Feiner* v. *New York,* 340 U. S. 315 (1951)].

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September, 1966.

SUPREME COURT, U.S.
FEB 27 1967
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

No opinion was written in the Criminal Court of the City of New York (R. 283). The opinions of the Appellate Term (R. 284-314) are reported in 48 Misc. 2d 611, 26 N. Y. Supp. 2d 841. No opinion was written by the Court of Appeals, but its decision is reported in 17 N. Y. 2d 829, 271 N. Y. Supp. 2d 274, and its amendment of its remittitur in 18 N. Y. 2d 683, 273 N. Y. Supp. 2d 431.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 2, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

Constitution and Statutory Provisions Involved

The Constitutional provision is the due process clause of the Fourteenth Amendment.

The statute is Section 722 subds. 2, 3 and 4 of the New York Penal Law:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: * * *

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd; * * *".

Questions Presented for Review

1. Whether the petitioners were convicted without the due process of law guaranteed by the Fourteenth Amendment because they were convicted without notice of the charges against them.

2. Whether petitioners' convictions for holding a street meeting to peacefully express political dissent violate the guarantees of freedom of speech and assembly embodied in the due process guarantee of the Fourteenth Amendment.

3. Whether subdivisions 2, 3, and 4 of Section 722 of the Penal Law of New York State, under which petitioners were convicted, are so vague and uncertain as applied to street meetings that they violate the due process guarantee of the Fourteenth Amendment.

Statement of the Case

The Complaint

The complaint against petitioners in the Criminal Court of the City of New York charged that "at 4.25 p.m. on August 8, 1964, vicinity Duffy Square—47 St. and B'way . . . . the defendants did unlawfully congregate and assemble at the above location obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so after being informed that their actions were not lawful"; and that defendants thereby violated Section 722, subdivisions 2, 3 and 4 of the Penal Law of the State of New York (R. 1).

Summary of Facts

According to the undisputed evidence, the street meeting leading to petitioners' convictions was held to protest the American policy in the Vietnam war, under the auspices of a group called the "May 2nd Movement", which had been formed a few months previously at Yale University (R. 125, 168, 284). Duffy Square, where the meeting was held on a Saturday afternoon at about 4 o'clock, is a triangular area in midtown Manhattan, extending the length of one block, from 46th to 47th Streets. Towards both the 46th and 47th Street ends are statues, hedges, and railings; the large paved center section is unused and unbroken save for a subway grating (R. 138). Pedestrian traffic to and from the Square is permitted only at crosswalks at the 46th and 47th Street extremities, well-separated from the open center section by the statuary and fixtures.[1]

The speakers at the meeting stood on the steps leading to a statue of Father Duffy towards the northern end of the Square, with the audience in the center section (R. 148, 149). Petitioners offered to prove that meetings for various causes such as bond rallies have been held in that section (R. 138, 139).

The People introduced a tape recording (R. 31, 32) according to which one of the petitioners, acting as chairman, began the meeting, stating that "under the auspices of the May 2nd Movement we are here to have a peaceful meeting" (R. 35). After only a few minutes of speeches about the war in Vietnam (R. 36), a police captain ap-

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[1] A photograph of Duffy Square was introduced in evidence as People's Exhibit 1 (R. 6); a similar photograph is reproduced in the record (R. 7).

proached the speakers and ordered them to disperse the assembly (R. 37). The chairman declared that the meeting should be allowed to proceed (R. 36, 37); the captain withdrew while the speeches continued; he returned after a few moments; he repeated his order and the chairman repeated his reply (R. 37, 38). The police captain apparently had arranged for the physical dispersion of the meeting: suddenly, two policemen on horseback rode into the center of the Square where the audience was standing, to force its dispersion, accompanied by approximately a dozen foot patrolmen (R. 38, 43, 44, 47). As a chief prosecution witness testified: "... then the horses came on behind the foot patrolmen . . . That's when everybody started shouting and yelling and running" (R. 38, 39). The petitioners tried to avoid the horses and to continue the meeting for some minutes until the police stated they were under arrest.

There was evidence that the police had pre-determined to break up the meeting (on the basis of a police policy later abandoned, and never acknowledged in court, to prohibit meetings for political dissent throughout a large area, regardless of traffic conditions) (R. 144, 200). Nevertheless, the prosecution attempted to prove, in an effort to justify the dispersal order, that the meeting was interfering with pedestrian and vehicular traffic.[2]

The only entirely disinterested witness to the meeting was a reporter from *The New York Times*, who was unacquainted with petitioners and was present solely in a rep-

[2] One police officer testified that he heard the Captain give this as a reason (R. 9). But neither the Captain nor the Inspector who accompanied him (R. 8) testified (R. ii). Nor were the Captain's remarks reproduced on the tape that was played (see R. 37). On the other hand, the only disinterested witness testified that the Captain had not referred to traffic in his order (R. 151, 153, 159).

ortorial capacity, called by the defense (R. 147, 148). Although other newsmen also attended the meeting (R. 148), the prosecution called only the participating policemen, its chief witnesses being two officers attached to the Police Department's Bureau of Special Services, who had had the speakers and previous meetings under surveillance (R. ii, 4, 5).

The *New York Times* reporter testified that the meeting was peaceful, orderly, small relative to the size of the center area of the Square where it was held, and not "attracting very much attention at all" until the advent of the horses (R. 148, 151, 161). Since the center section of the Square concededly was large enough to accommodate many more than the audience at its maximum estimate,[3] the prosecution contention was that the audience pressed forward towards the Father Duffy statue to hear the speakers; that consequently a few of the auditors stood in the gutter and the audience filled the Square from curb to curb, at a point near the speakers; that pedestrians walking north to south or vice versa therefore had to walk in the gutter at this point; and because of the people in the street that the automobiles had to "veer" from one lane to another in the adjacent broad avenues (each having a number of traffic lanes) (R. 11, 12, 16, 17, 92, 93).

Even if the truth of this testimony is assumed—despite its overall contradiction by the *Times* reporter and numerous indications that it was contrived to fit the claim that the dispersal order was based on traffic conditions rather than pre-determined—the police captain admittedly gave

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[3] Estimates of the number in the audience varied from 60 by *The New York Times* reporter, to 200 by the chief prosecution witness (R. 150, 11).

no suggestion or order that the audience narrow itself in the Square as an alternative to dispersal. Further, the maximum inconvenience possible for pedestrians from the alleged curb-to-curb audience, was that they would have been forced to use the cross-walk at one end of the Square instead of proceeding to that at the other.

As to the conduct of the audience during the speeches, before the dispersal order, there was occasional handclapping (R. 36, 37) and according to the *Times* reporter "ordinary cheering . . . not particularly restrained, but I would not say it was a ruckus, or shrill, or anything like that" (R. 150, 151).[4]

The prosecution testimony that thousands of pedestrians on the sidewalks facing the Square stopped to look at the meeting (R. 108, 109) is wholly incredible, considering the *Times* reporter's testimony that the meeting attracted little attention and considering that it was uneventful prior to the advent of the horses. The Appellate Term opinion seems to assume that this prosecution testimony referred to the period after the order to disperse (R. 286). In any event, even if such an occurrence could be relevant to petitioners' convictions,[5] there is no indication that the alleged viewing of the meeting caused or threatened any obstruction or disturbance.

Most of the prosecution evidence related to the acts of individual petitioners in the period of the police effort to

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[4] One of the Bureau of Special Services policemen testified that before the meeting began a group of unspecified size chanted " 'Down with American imperialism' and 'Stop the war in Vietnam' and things of that nature" (R. 108). However, there was no indication that the alleged chant could be considered a disturbance of the peace.

[5] See *Edwards* v. *South Carolina*, 372 U. S. 229, 237.

physically disperse them, between the advent of the horses into the Square and petitioners' arrests. Nine of the prosecution's eleven witnesses were policemen who had come to the Square only at the time of the dispersal order, each testifying as to additional individual acts.[6] There was no evidence of acts of violence, profanity or obscenity by petitioners, their most opprobrious term being "fascist police" or "fascist cop" as the policemen tried to drive them off the Square. While the policemen described petitioners as running around in the Square and "screaming", their "screaming" consisted mainly of declarations and calls to each other, as they scattered to avoid the horses, as to their right to continue the meeting (e.g., R. 45-48, 52, 53). They submitted to arrest as soon as the police sought to arrest them. For example, the officer who arrested petitioner Rhoads testified:

> "There was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' and this and that and I observed Rhoads running towards the steps of the Square itself and I followed him up and told him he would have to leave the Square. If he didn't, he would have to be placed under arrest because he was part of the general disturbance there and he said he didn't want to leave and I told him if he didn't leave the second time I was going to place him under arrest and I placed him under arrest and I took him down from the center of Duffy Square by the monument there" (R. 60).

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[6] None of these acts were included in the charges, and the evidence thereof should have been excluded in response to petitioners' due process objection (see *infra*).

Similarly the officer who arrested petitioner Gelles testified:

> "I said, 'Please move along. You are not accomplishing anything by standing here.' Again he ranted, 'You can't tell me what to do. I have my rights.' I said, 'Mister, I am going to arrest you if you don't move on', and he said, 'Go ahead and arrest me.' . . . Q. All right, what happened then? A. I informed him I placed him under arrest and walked across in front of the Square, which would be the south of the Square, and placed him in a cab" (R. 83).

The policemen emphasized that petitioner Maher hit one of the police horses with a rolled-up cardboard placard (R. 99). Mr. Maher testified without contradiction that he was attempting to keep the horse from trampling on another young man who had stumbled and was lying near the horse's feet (R. 168, 169). None of the petitioners had or used any type of implement other than Mr. Maher's use of the rolled placard (see R. 156).[7]

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[7] Several policemen claimed that petitioners Kunis and Eckhardt, who worked together as puppeteers and brought with them a puppet symbolizing anti-militarism, ran into the street after the order to disperse and lay down in the middle of Broadway (R. 56, 57, 74, 75). The petitioners testified that Kunis lay on the sidewalk and entirely denied the allegation as to Eckhardt (R. 186, 187, 207, 215, 216, 223-25). The *Times* reporter testified that he was "not sure if it was on the street or sidewalk" that he saw a person lying (R. 161).

Presentation of Federal Questions in State Courts

The amended remittitur of the New York Court of Appeals, the State court of last resort, states: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that (1) their convictions violated the due process guarantee of the Fourteenth Amendment because they were based in whole or part on acts which were not charged in the complaint; (2) their convictions violated their Constitutional rights of free speech and free assembly, and (3) their convictions under subdivisions 2, 3 and 4 of section 722 of the Penal Law violated the due process guarantee of the Fourteenth Amendment because of vagueness. The Court of Appeals held that appellants' Constitutional rights were in no way violated" (R. 320). The points listed by the Court were presented to it in petitioners' briefs and oral argument.

As to the lower State courts, the first point presented to this Court for review—that petitioners were convicted for acts that had not been charged against them—was raised repeatedly in objections to the introduction of evidence in the trial court (R. 19, 28). Specifically petitioners' attorney objected

> "to any testimony as to the occurrences after Captain McAllister attempted to disperse this meeting, on the grounds that they are not within the allegations of the complaint. It would be a violation of due process to try people on charges which have not been alleged and which they have not had notice and are not included in the sworn complaints . . . " (R. 60, 61).

And in argument to the trial court at the conclusion of the trial, counsel stated:

> "Again, at the risk of repetition, I want to say that the complaint is obviously based on the conduct of the whole group. There is no implication in these charges whatsoever, that there would be any attempt to prove . . . or that there would be any evidence about individual physical acts, as to which testimony has been admitted; . . . therefore there can be no conviction based on those acts consistent with due process of law" (R. 265).

In the lower appellate court, the Appellate Term of the Supreme Court of the State of New York (hereinafter called Appellate Term), petitioners' briefs presented the point as a matter of State and Federal due process. One judge rejected it (R. 294); one judge may or may not have considered it (R. 308); and the dissenting judge accepted this Constitutional argument, relying on the decisions of this Court as to Federal due process (R. 312).

The second question presented for review here—that the convictions violate the guarantees of freedom of speech and assembly—was argued to the trial court. Petitioners' attorney asserted that "conviction on the evidence that has been presented would violate the State and Federal constitutional guarantees of free speech and free assembly" (R. 258) and quoted at length from this Court's decisions under the Fourteenth Amendment, in particular *Edwards* v. *South Carolina,* 372 U. S. 229 (R. 263). The Federal Constitutional point was presented in brief and oral argument to the Appellate Term; the Court's opinion explicitly

rejected it (R. 300, 301) and the dissenting opinion explicitly accepted it (R. 310-12).

The third Constitutional question, as to the vagueness of the statute, was presented by brief in the Appellate Term, which rejected it (R. 293-94).

POINT I

Petitioners were convicted for matters not charged in the complaint in violation of their right to due process of law as guaranteed by the Fourteenth Amendment.

The complaint, as already noted, charged petitioners with "intent to provoke a breach of the peace" by unlawfully assembling, obstructing traffic, using loud and boisterous conduct and causing a crowd to collect and refusing to move on after being informed that their actions were "not lawful" (R. 1).

There is no basis for the statement by the majority in the Appellate Term (R. 294) that the complaint (R. 1) justified charges based on conduct after the order other than the mere failure to obey it. It is clear that the gravamen of the complaint is that petitioners were conducting an unlawful meeting—unlawful because they obstructed traffic, caused a crowd to collect and used boisterous language, and that they were therefore told to move on. Certainly that was no indication that any of them was being charged with any of these matters occurring after the order. The only conduct after the order referred to in the complaint is the failure to move on.

In fact there was no evidence to support the charge that anything occurred which justified a declaration that the

meeting was unlawful. Prior to the police interference there had been no substantial interference with traffic, no loud or boisterous conduct whatever, no undue crowd.

The only testimony about obstruction during the conduct of the meeting was as follows: Officer Behr testified (R. 12) that some people had to walk on the street around the Duffy Square area, that some cars veered to avoid these people, and that some of the demonstrators were also in the street. He made no attempt to be specific other than to say (R. 17) that cars had to switch from one lane to another. He did not claim that the flow of traffic was interfered with. Officer Fahy expressly testified that before the order to disperse was given traffic had not "backed up" (R. 78). The testimony of Officer Walsh that traffic was stalled (R. 92, 93) related to the time after the order to disperse had been given, because he evidently was one of the policemen who arrived for the dispersal (R. 87, 88). No one testified to "boisterous" conduct during the earlier period. And, of course, the charge that a crowd collected is meaningless unless there was other evidence of improper conduct. Certainly there was no basis for a charge that the assembly was unlawful. The order to disperse was, therefore, unlawful—not the meeting.

It is evident, however, from the testimony adduced and the arguments of the District Attorney at the trial that the People based the prosecution on the conduct of petitioners *after* the order to disperse (R. 27). The convictions were affirmed by the Appellate Term on this theory (R. 296, 297). Whatever justification there may have been for proceeding against any individual whose conduct may have been improper, the complaint in this case did not proceed on that basis at all. Had that been done petitioners could have sought separate trials to avoid confusion and preju-

dice.[8] But no distinction was made at this trial between the various individuals. They were unaware of what they were charged with.

The failure of the trial court to limit the evidence to the acts specifically charged in the complaint and its failure to indicate on what basis its judgment rested made it impossible for any appellate court to determine whether the convictions rested on the trial court's belief that the meeting was unlawful or on acts occurring after the order to disperse; impossible to determine which defendant was found guilty for what cause. This alone violated due process. See *Spevack* v. *Klein,* decided January 16, 1967, slip opinion p. 6.

As this Court said in *DeJonge* v. *Oregon,* 299 U. S. 353, at 362, "Conviction upon a charge not made would be a sheer denial of due process." And convictions were set aside for lack of adequate notice of charge in that case and in *Cole* v. *Arkansas,* 333 U. S. 196, *Thompson* v. *Louisville,* 362 U. S. 199, and *Garner* v. *Louisiana,* 368 U. S. 157.

These considerations are further enhanced in view of the fact that First Amendment rights are also involved and that it appears that here, as in *deJonge,* hostility to the purposes of the meeting was a factor.

This Court has been astute to prevent the use of omnibus breach of the peace statutes in aid of deprivation of First Amendment rights: *Edwards* v. *South Carolina,* 372 U. S. 229; *Cox* v. *Louisiana,* 379 U. S. 536; *Ashton* v. *Kentucky,* 284 U. S. 195. Cf. *Brown* v. *Louisiana,* 383 U. S. 131.

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[8] The continued introduction of evidence of what occurred after the order to disperse, the nature of which had not previously been intimated made it impossible for trial counsel to do more than continue to object. There was not even any disclosure in advance by the prosecutor of what acts were charged against which of the defendants. The confusion was complete.

The views expressed by Mr. Justice Hofstadter in his dissent (R. 312, 313) reflect a correct understanding of this Court's views and should receive this Court's approval by a reversal here.

POINT II

Petitioners' convictions violated their freedom of expression as guaranteed to them by the Fourteenth Amendment.

One cannot read the record herein without reaching the conclusion that the police order to disperse, the arrests, and the prosecution were all motivated by hostility to the unpopular views expressed at the meeting. But this Court has been careful to prevent the use of disorderly conduct or breach of the peace charges in such situations.

It is one thing to uphold a conviction under a law punishing trespass with "malicious and mischievous intent" as was done, by a sharply divided Court, in *Adderley* v. *Florida,* 385 U. S. 39; quite another so to treat a conviction under a breach of the peace statute: see *Brown* v. *Louisiana* and *Edwards* v. *South Carolina, supra.* Here there can be little doubt that the statute was used to restrict freedom of expression.

We start with the fact that the first statement made by a police captain (who, significantly, did not testify) indicated a belief that no meeting could be held at that place without permission (R. 9, 126, 151). This is confirmed by the chairman's response, as recorded on the tape (which also, significantly, did not record the captain's order to disperse) that permission was not needed and that those present would "exercise our constitutional rights" (R. 36).

In this connection an offer of proof was made at the trial to show that meetings had been held in Duffy Square for popular causes, such as bond rallies (R. 138, 139).

Any attempt to sustain these convictions on the basis of interference with traffic must founder for lack of opinion by the trial court. For the convictions might well have rested on that court's belief that what occurred after the order to disperse justified them. Moreover, as we have already shown, there was no testimony of substantial interference until the police injected themselves. It should be borne in mind that Duffy Square, as the picture shows (R. 7) is a triangular area largely unused between Seventh Avenue and Broadway. The meeting took place in front of the statue (which appears on the left, or north side, of the picture) (R. 8). The reference by the Appellate Term (R. 301) to this Court's comment in *Cox* v. *Louisiana, supra,* about a meeting "in the middle of Times Square at the rush hour" has no application here. The meeting was several blocks north of Times Square, was not in the middle of the street, and was not in the rush hour.

Even if some demonstrators did overflow the Duffy Square area itself the order to disperse was nevertheless unjustifiable. For if the police had really been concerned with such inconsequential interference with traffic that could have been averted by ordering a slight narrowing of the gathering—and that was not done (R. 14, 15, 112), cf. *Edwards, supra* at p. 232, n. 5.

The reliance (R. 304) in the majority opinion of the Appellate Term, on *Feiner* v. *New York,* 340 U. S. 315, is we submit misplaced. There was here no inflammatory lan-

guage, no open hostility expressed by bystanders, no reason to suppose that a fight might ensue. Nor is *People* v. *Penn,* 16 N. Y. 2d 581, cert. den. 383 U. S. 969 (cited R. 308), relevant. For there defendants had obstructed trucks by lying down in front of them to prevent delivery of the cement they were transporting to a building site.

We submit that the convictions cannot stand consistent with First Amendment principles. Since the order to disperse a peaceful meeting was improper, there can be no punishment for failure to obey it: *Henry* v. *City of Rock Hill,* 376 U. S. 776; *Shuttlesworth* v. *Birmingham,* 382 U. S. 86, and *Cox* and *Edwards, supra.*

POINT III

The statute [Penal Law §722, subds. 2, 3, and 4] is so vague as applied here that it violates the guarantee of due process of law under the Fourteenth Amendment.

The three subdivisions deal with separate matters: 1. annoyance of others; 2. refusal to move when ordered to do so by the police; 3. causing a crowd to collect except when lawfully addressing it.

1. The statute lays down no guide whatever for determining what constitutes the forbidden annoyance. No attempt was made by the majority of the Appellate Term to deal with this issue, although Mr. Justice Hecht did note the difficulty of defining how serious the annoyance must be (R. 296). We submit that under the decisions of this Court in *Winters* v. *New York,* 333 U. S. 507, *Burstyn* v. *Wilson,* 343 U. S. 495, *Baggett* v. *Bullitt,* 377 U. S. 360,

Keyishian v. *Board of Regents*, 385 U. S. ——, no conviction under this subdivision can stand.

2. Certainly not every refusal to move when ordered to do so by a policeman can be punished criminally. Since the statute fails to specify the circumstances under which such failure should be punishable and leaves the freedom of the pedestrian entirely at the mercy of any police officer, it is so broad as to fall within the condemnation of this Court's decisions already cited.

3. Finally, this subdivision begs the basic question: when is a meeting lawful. For nowhere in the law of New York are standards laid down which would determine the legality of street meetings.

* * * * *

In short, not one of these provisions gives adequate notice of what is and what is not criminal conduct. Certainly as applied here to an exercise of the constitutionally protected right to freedom of expression, they cannot be upheld. Not one of these constitutes that "narrowly defined" statute which this Court has held required in First Amendment areas: see *Cantwell* v. *Connecticut*, 310 U. S. 296, at 307; *Cox* v. *Louisiana, supra*, at 562, *Edwards* v. *South Carolina, supra, City of Rock Hill, supra*. See also Mr. Justice Douglas dissenting in *Adderley* v. *Florida*, 385 U. S. 39, at 55.

CONCLUSION

The judgment under review should be reversed and the complaint dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 68

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Defendants-Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

Opinions Below

The trial court did not deliver an opinion. The opinion of the Appellate Term is reported at 48 Misc. 2d 611 (1st Dept. 1965). The affirmance of the Court of Appeals, without opinion, is reported at 18 N. Y. 2d 683 (1966).

Questions Presented

(1) Did the Constitution's guarantees of free speech and assembly preclude police from ordering the dispersal of a political protest meeting held in Times Square, after observing that the gathering substantially interfered with pedestrian and vehicular traffic in the area?

(2) Are Sections 722 (2) and 722 (3) of New York's Penal Law unconstitutional on their face or as applied to convict of disorderly conduct those members of an assembly who refused to move on in obedience to a reasonable police order, and who acted in a manner which disturbed and obstructed others?

(3) Did the petitioners receive adequate notice of the charges in the complaint which alleged a failure to obey a police order to move on?

The Statute Involved

The relevant portions of Section 722 of the New York Penal Law provide:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

• • •

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;"

Statement

On August 8, 1964, a complaint was filed against the defendants in the Criminal Court of the City of New York, charging them with disorderly conduct in violation of New York Penal Law, Section 722, Subdivisions 2, 3 and 4 (R. 1).* On October 2, 1964, after a joint trial, defendants were found guilty as charged (IMPELLITTERI, J.), and on November 18, 1964, sentence was imposed (R. 278, 279). Defendants Maher, Laub, Rhoads, Ostrow, Shallit, Copeland and Teahan were sentenced to pay a fine of twenty-five dollars or, in default thereof, to serve five days in jail. The remaining defendants received suspended sentences (R. 279).

On appeal, the Appellate Term, First Department, affirmed the judgment with an opinion (R. 284-314). The Court of Appeals affirmed the order of the Appellate Term. Certiorari was granted by this Court on October 24, 1966.

THE EVIDENCE

The People's Case

The scene prior to the police orders to disperse

At about 4 p.m. on Saturday, August 8, 1964, approximately 200 to 300 persons were gathered on Duffy Square, a concrete island extending from 46th to 47th Streets between Broadway and Seventh Avenue (Behr, R. 5, 11;

* References, unless otherwise indicated, are to pages of the Transcript of Record in this Court.

Walsh, R. 90, 95; Koopman, R. 108). Bearing placards, the group loudly chanted, "Down with American Imperialism. Stop the war in Vietnam," accompanied by defendant Eckhardt's beating on a large kettle drum; several paper effigies had been set up on a sidewalk portion of the Square by Eckhardt and the defendant Kunis (Behr, R. 10; Koopman, R. 108, 110). Shortly after 4 p.m. the defendants Laub, Luce, Copeland and Maher mounted steps leading to a statue at the northern end of the Square and Laub, through an electric megaphone, addressed the crowd (Behr, R. 5, 11; Koopman, R. 107).

As Laub began to speak, the group "jamming" toward him, covered the width of the Square "from side to side" and began "spilling out into the street" (Behr, R. 12, 26-7; Koopman, R. 110). Automobiles were "veering sharply to the right on Broadway and to the left on Seventh Avenue to avoid" demonstrators in the street—including Eckhardt, Kunis and Kyllingstad—and pedestrians whom the demonstrators, blocking the sidewalks on the Square, had forced into the street (Behr, R. 12; Walsh, R. 90; Koopman, R. 110). Thus compelled to walk in the street, pedestrians complained to several police officers present (Behr, R. 21-2). Other "pedestrians couldn't get through the street to the bus stop" on the Square (Walsh, R. 90). On the Broadway and Seventh Avenue sidewalks opposite the Square were approximately 4,000 to 5,000 pedestrians, several thousand stopping to look at the demonstrators (Behr, R. 14; Koopman, R. 108-9, 115).

The orders to disperse and subsequent events

Detective **Fritz Behr** testified that after Laub spoke briefly, introducing the defendant Luce, a police inspector and a police captain approached Laub, Luce, Copeland and Maher at the stairs to the statue (R. 8). The captain informed them that because the demonstration was interfering with pedestrian and vehicular traffic, the meeting would have to be terminated (R. 9). Laub then took the megaphone from Luce and told the crowd:

> "The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here" (R. 9).

He then stated that, nevertheless, the demonstration would continue; and he returned the megaphone to Luce who spoke briefly and in turn introduced Copeland (R. 9). Copeland stated that "if everybody stayed there and protested to the utmost, that the police department wouldn't do anything about their meeting" (R. 10).

At this point the police captain again approached Laub, Luce, Copeland and Maher, and repeated his order to disperse (R. 10). Taking the megaphone, Laub again urged the group not to disband (R. 10). The crowd began chanting, "Let him speak. Let him speak" (R. 18). The captain signalled fifteen policemen, including two on horseback, over to the Square (R. 20-21). Behr further testified that the defendant Maher struck one of the horses several times with a rolled-up placard (R. 18).

Patrolman **Henry Campbell** testified that after the captain directed Laub to break up the meeting and Laub urged the crowd to stay, "Then the whole crowd started to run all over the place and they were running in the gutter and on the sidewalks (R. 63-5). Campbell approached Laub on the sidewalk of the Square and told him several times to move on (R. 65-6). Laub refused and was then placed under arrest (R. 66).

Patrolman **Joseph Hines** testified that after the police captain spoke to the defendants at the stairs to the statue, Copeland ran back and forth across the Square with a loudspeaker, calling persons over to him (R. 68-9). He was arrested after he again mounted the steps to the statue and refused to leave the area (R. 69).

Patrolman **Donald Walsh** testified that after the police captain told the speakers to break up the meeting, the defendant Apter began:

> "running from the sidewalk to the street, back and forth, speaking to the crowds, telling them not to obey our orders to get back on the sidewalk and to make openings for pedestrians" (R. 88). Walsh told Apter "Stop telling them this and behave yourself" whereupon Apter ran out in the street, yelling to the crowd "Stay where you are" (R. 88-9).

Placed under arrest, Apter threw himself down on the Square and screamed "brutality, fascist police" (R. 89). As the officer attempted to get him up, the defendants Teahan and Martin intervened, pulling on Apter and shouting "Police gestapo" (R. 89-90). Told to move on, Teahan

and Martin refused, whereupon they were placed under arrest (R. 90).

Detective **Francis Koopman** and Patrolman **Robert Annitto** both testified that after the speakers were ordered to break up the meeting, Maher began running around the Square waving a placard, and when mounted policemen arrived on the scene, Maher "ran over to one of the horses and started smacking it" with a placard (R. 38, 110). Annitto testified that the officer kept the horse under control (R. 99), while Koopman stated that the horse reared up on its hind legs when struck (R. 113). Annitto also testified that he observed the defendant Turner standing on the sidewalk in front of two policemen, "trying to keep them" from bringing another of the defendants into a police car (R. 100). Turner was hollering, "Leave them alone" and "fascist police" (R. 99-100).

Patrolman **George Knoll** testified that he approached the defendants Gelles and Turner and a third person who were standing close together on the sidewalk of the Square and said, "You fellows can't stand here. You are blocking the roadway and * * * the pathway" (R. 82, 84). Gelles yelled, "Oh, you fascist cops. You think you can get everything and do anything you want" (R. 83). Asked twice more to move on, Gelles refused, and was then placed under arrest (R. 83). Moments later, Knoll observed the defendant Kyllingstad on the sidewalk of the Square "in a very loud conversation * * * with a sergeant" (R. 83-4). She slapped the sergeant, whereupon Knoll placed her under arrest (R. 84).

Patrolman **Joseph McNulty** testified that after the conversation between the police captain and the speakers, the defendant Meisner began "running around Duffy Square Park calling to others, shouting that they did not have to leave; that they could stay" (R. 46). McNulty approached Meisner on the sidewalk of the Square and told him to move on, whereupon he refused and was placed under arrest (R. 46-7). After the order to disperse, the defendant Jerome, carrying an American flag, began "running from one group to another," shouting that the "Fascist police" had no right to stop them. "As the mounted patrolman would disperse a group, the defendant Jerome, with the flag, would run behind the horse and call to others" (R. 47-8). Ordered to move on, Jerome said "no" and was then arrested (R. 48).

Patrolman **Herbert Engelhardt** testified that after the crowd was told to disperse, he observed the defendants Kunis and Chadwick on the sidewalk being told to move on (R. 52, 55-7). Kunis then "ran out into the middle of Broadway and laid down" (R. 56). When policemen tried to move Kunis from the street, Chadwick yelled, "Leave him alone, fascists" (R. 52). Again told to move on, Chadwick then sat down on the sidewalk and when an officer attempted to pick her up, she bit him (R. 53). She was then placed in a patrol car (R. 53).

Meanwhile, the defendant Shallit was moving all over the area shouting, "Do not leave here * * * Come back. We have our rights. Don't give in to the police. They are fascists they have no rights" (R. 53). The witness briefly lost sight of her then "saw her again in front of about five

people. She was actually doing most of the shoving and pushing back at * * * police officers trying to move the people back'' (R. 53-4). She was then placed under arrest (R. 54).

Patrolman **Edward I. Fahy** testified that upon observing Kunis standing on the sidewalk of Duffy Square screaming, ''fascists, police brutality, gestapo,'' he told Kunis to leave the area whereupon Kunis ''ran out into the middle of Broadway and laid down'' in the second lane of traffic (R. 74, 75). Fahy went out to him and told him to get up (R. 74). Kunis ''continued to lay there. Traffic was getting backed up'' so Fahy, assisted by Patrolman Coffey, carried Kunis' ''limp'' body into a patrol car (R. 74).

At this point Fahy observed the defendant Eckhardt ''lying in the middle of Broadway''—also in the second lane of traffic (R. 74-5). The officer told him that if he did not get up, he would be arrested whereupon Eckhardt threw his arms up and said, ''Here I am'' (R. 75). Fahy then placed him under arrest (R. 75).

Patrolman **Andrew Coffey** testified that he assisted Patrolman Fahy in arresting Kunis after he lay down in the street (R. 59). At that time ''[T]here was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' '' including the defendant Rhoads who was standing on the sidewalk ''screaming at the top of his lungs'' for five or ten minutes (R. 60-61). Rhoads ran to the statue. Then observing Rhoads run to the statue area of the Square, Coffey followed him and told him to move on (R. 60-61). Rhoads refused, the officer repeated his order,

Rhoads again refused and was placed under arrest (R. 61). As the officer put Rhoads into a taxicab, assisting the police, the defendant Ostrow came from the Square into the street "yelling 'fascist cop' " and "making a lot of noise" (R. 62). Upon his refusal to be quiet, Ostrow was placed under arrest (R. 62).

The Defense

Phillip Luce testified that he was one of the organizers and leaders of the meeting at Duffy Square (R. 123). Somewhere between 100 and 150 people had gathered there. After the introductory speeches a police officer appeared and said that "this is an illegal meeting and has to be stopped immediately. You have no right to hold a meeting in Duffy Square" (R. 126). After the defendant Laub related to the crowd what the police officer had said, they did not move, and Laub continued to speak. Suddenly, two horses rode into the crowd, and the police began arresting those who were gathered on the steps (R. 127).

According to the witness, the group had been absolutely quiet until the police arrived on the scene (R. 134). There had been no diversion or interruption of vehicular traffic, and the entire assembly was in the Square, though it was possible that some people might have been in the street (R. 125-6, 134). Ten thousand leaflets had been printed and distributed around the city, announcing the meeting (R. 167).

Joseph Leliveld testified that he is a reporter for the New York Times who had been assigned to cover the meeting at Duffy Square on August 8. When he arrived shortly before 4 o'clock there was a net-work television car,

on the scene, but apparently the demonstrators had not yet arrived (R. 148). Then, a group of people with signs arrived and formed into ranks (R. 149). Signs were distributed and leaflets were circulated.

Early in the meeting, at which there were no more than 60 people, Captain McCallister stepped up and asked who had given them permission to hold the meeting in Duffy Square: "And I think his first words were, 'Hold this up. Who is giving you permission?' Something to this effect" (R. 150-51). Using the bullhorn, Laub responded, stating that they did not need permission (R. 151-2). The captain withdrew and after a short while returned, stating that if they did not disperse they would be subject to arrest for disorderly conduct (R. 154). "[A]t that point things got a little out of hand, because a number of people seemed to start making speeches" simultaneously, and "there were a lot of people that were just plain shouting" (R. 154, 163). When the captain's warnings were not heeded, about a dozen policemen plus two mounted policemen moved into the area and began dispersing the group (R. 155). A majority of the group actually moved out of the area, but about 20 tried to hold their ground. It was this latter group which the police began arresting (R. 155-6, 163-4).

The witness further stated, that although he was not sure, he did not observe any interruption of traffic prior to the arrival of the police on the scene (R. 156-7). Nor did he hear Captain McCallister at any time inform the group that vehicular and pedestrian traffic was being blocked by this demonstration (R. 159-60). He did see a girl hit a police officer with her fists (R. 160).

Albert Maher, a defendant, testified that he had been at Duffy Square to participate in and "speak at a meeting to protest the war being carried on now by the United States in Southeast Asia" (R. 168).

The defendant acknowledged having hit two horses, several times, both with a placard and his hand. He claimed to have done so in order to stop them from going into the crowd (R. 169-70).

Ten thousand leaflets had been sent out to advertise the meeting, and about 100 people were in attendance (R. 172). Bullhorns were used to amplify the speakers' voices (R. 173).

Theodore Ostrow, a defendant, testified that he had gone to Duffy Square to attend the meeting (R. 174-5) where about 80 or 100 people had assembled. When he arrived, Miss Shallit handed him a black armband so that he could be identified as a monitor in the demonstration (R. 174). He was to make "sure that the participants in the meeting would stay within the Duffy Square area and would not go into the street; and if any disorders I could handle did break out, I should try to subdue any ruckus or yelling, or what have you" (R. 174-5).

The defendant stated that he was arrested about three or four minutes after the police horses arrived (R. 176). He was maintaining his position in the Square, although moving "to avoid the horses, which were charging in about every direction," when he saw the defendant Miss Kyllingstad being taken half-dragged and half walking" to a pa-

trol car or taxicab (R. 176). A personal friend of Miss Kyllingstad, he walked over to the officers and informed them that she could not be arrested, because she has a young baby (R. 177, 179). The officer replied that they would "take care of that later" and the defendant was then shoved backwards towards Duffy Square Park into a group of two or three officers where he was held and then "shoved by them again almost into [his] original position" (R. 177). He was then taken to a taxicab, and placed under arrest (R. 178).

Jeremiah Teahan, a defendant, testified that he had gone to the meeting "to hear what the May 2nd Committee had to say in regard to the foreign policy of the United States in Southeast Asia" (R. 184).

Prior to his arrest he had walked to where the defendant Kunis was lying on the sidewalk (R. 186). The defendants Chadwick and Eckhardt were also there (R. 185). Kunis was carried to a car, where he was joined by Eckhardt (R. 186-7). Teahan "then went down further [and] was pushed away from there by several policemen" (R. 187). Down further, where Copeland was being taken to a squad car, Teahan claimed he was then pushed "out of the way * * * into the street" by Captain McCallister, whereupon a policeman told him to "Get out of the street" (R. 187, 188). Another policeman then pushed him back onto the sidewalk where he stayed until still another policeman asked him what he was doing there. He replied that he was trying to stay away from the horses. "In the confusion, somehow or other, someone pushed" him back into the road, in front of a squad car (R. 188). A policeman grabbed him from behind and took him to a taxicab, where the de-

fendants "Key Martin and possibly Apter, had been already along with Patrolman Walsh" who then "proceeded to punch (Teahan) in the mouth, with two witnesses present" (R. 188-9).

Key Martin, a defendant, testified that he was at Duffy Square on August 8, "to speak on behalf of Youth Against War and Fascism, at a rally opposing the United States War in Vietnam and opposing what seemed at that time to be the imminent expansion of that war" (R. 192-3).

Because of his concern for his fellow-peakers, Copeland and Meisner, he followed them after they had been led away by the police (R. 193). A minute later, an officer asked if he wanted "to go too" and together with another policeman, took him to a cab (R. 193).

Robert Apter, a defendant, testified that Patrolman Walsh warned him that if he did not move he would be arrested (R. 201-02). A few seconds later, while he was "urging people to stay there and to re-group and have a peaceful meeting" Patrolman Walsh grabbed him and said, "I told you to move. You are under arrest" (R. 202).

On cross-examination, the defendant acknowledged that he had been running around and screaming, and that after the police would tell people to move on, he would tell them to stay (R. 203-4).

Bruno Eckhardt, a defendant, testified that he attended the meeting in Duffy Square as part of a puppet theater group (R. 205). Their equipment included a four-head soldier puppet, which was held by two men wearing skull masks, and a big kettle drum, which the defendant played

but which he stopped playing when told to by the officer (R. 206).

He observed Kunis being carried to a patrol car after Kunis had sat down on the sidewalk (R. 207). Eckhardt followed him, opened the door and sat down next to him (R. 207). It was not until he was in the station house that he learned he was under arrest (R. 207-8).

Joyce Chadwick, a defendant, testified that she is a friend of the defendants Eckhardt and Kunis, and had come to the meeting with them (R. 213-14, 216). She and Kunis were standing on the steps to the south of the statue when the police approached (R. 215-16). Kunis "walked down, off the steps, onto the sidewalk and sat down on the sidewalk, not in the street" (R. 215).

The defendant acknowledged that she did try to bite officer Engelhardt, but she did not believe she had punched him (R. 210). She further stated that she did nothing after the officer told her to move off the steps (R. 218, 220).

Ann Kyllingstad, a defendant, testified that she did strike a police officer on the back. This occurred while the defendant Laub was being placed under arrest (R. 230-32). Several officers had approached her and said "Come on, Miss, if you do not move on you will be arrested" (R. 234).

Arthur Kunis, a defendant, testified that at the time of his arrest he was sitting in the vicinity of the flagpole, on the west side of Duffy Square (R. 222-3). The horses had been "turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people" (R. 223). Upon witnessing this, the defendant felt that he "had no other recourse but to sit down and refuse

to cooperate." When the police arrived he "went completely limp and laid down" on the sidewalk (R. 224-5). He denied yelling or screaming (R. 228).

Pierre Meisner, a defendant, testified that after the police orders to disperse, he began shouting "Let them speak" (R. 236) and may have shouted "That they did not have to leave" (R. 237-8). He denied being told by an officer to leave the area (R. 238).

William Turner, a defendant, testified that he had been assigned as a monitor at the meeting—at which possibly 100 people were in attendance—to maintain order, allow for pedestrian traffic and keep people out of the street (R. 239-40).

The crowd (including the defendant) has been chanting "Let them speak," apparently determined "to drawn out * * * any further orders" when, after about a minute and a half, the captain left the scene and "suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square" (R. 241-2, 244-5). The defendant walked up the steps, holding his placard up, saying nothing (R. 242). On several occasions he was moved, but he continued to hold his "placard up to the people to see what I was there for" (R. 242). Finally, he was taken to a car (R. 242-3, 247).

The defendant denied ever screaming "Fascist police" or "Leave her alone" (R. 245).

Summary of Argument

Choosing for assembly an area wholly unrelated to its purpose, but calculated to obtain the dramatic publicity inherent in a major disruption of that area, petitioners and several hundred others gathered in Times Square on a busy afternoon. Spilling into the roadways, menacing the safety of vehicular and pedestrian traffic, the group was asked repeatedly by the police to disperse.

Petitioners refusal to do so constituted a violation of New York Penal Law Section 722, Subdivision 3. As construed, that provision punishes refusal to obey an order to move on only if that order is based on serious and substantial interference with normal commerce. The police action here, pursuant to that statute, was a classic instance of the neutral regulation of time, place and manner of public demonstrations that this Court has consistently deemed constitutional. Wholly unsupported in the record is petitioners' bald allegation that hostility to petitioners' views motivated the arrests.

Even should this Court hold unlawful the police order to move on, the chaotic excesses of petitioners' conduct in the course of refusing that command amply justified their conviction of Section 722, Subdivision 2. Sharply circumscribed by New York courts, that provision proscribes only substantial disturbance and annoyance to others. Struggling to avoid the consequences of their tumultuous behavior after the order to disperse, petitioners claim that these acts were not charged in the complaint; examination of the complaint, however, reveals that petitioners had full and fair notice of these charges.

POINT I

New York's disorderly conduct statute, as construed by its courts and as applied here, does not infringe upon the rights of the defendants under the First and Fourteenth Amendments.

Heralded by the distribution of 10,000 leaflets, a political protest meeting was unwisely held at 4 p.m. on an August Saturday on a small concrete island known as Duffy Square, located in the middle of the north end of Manhattan's busiest hub, Times Square. Although initially peaceful, the gathering was too large, attracting hundreds of persons who, quite naturally, began to spill off the narrow confines of the island into the vehicular roadways which surround it. Pedestrian traffic was forced to circumnavigate the protesters. Automobiles swerved to avoid the pedestrians in traffic lanes. People were unable to get to the bus stop located on the island. The curious stood by the thousands, according to police estimates, congregating around the square to observe the scene. Thus, a classic instance of interference with the normal flow of pedestrian and vehicular traffic developed, endangering life and limb as well as disrupting the orderly commerce of a thronged municipal quarter.

Presented with this dangerous situation, the police acted wisely and with restraint, repeatedly approaching the leaders of the group and directing that the meeting on Duffy Square be disbanded. Out of the petitioners' response to this obviously necessary and perfectly proper direction arose their arrests. According to the police accounts credited by the fact finder, each of the present petitioners reacted in a manner calculated to provoke disturbance. Not

only did they refuse to disperse, but they loudly exhorted the crowd to stand fast, inveighed against the police with cries of "fascist" and "gestapo," slapped police horses, assaulted police officers, and rushed into the roadway to form human traffic obstacles. For this active and aggressive resistance to the lawful efforts of the police, they were arrested, tried and convicted. They now attack those judgments on constitutional grounds.

Penal Law, Section 722(3)

Petitioners' willful failure to obey the police order to move on constituted a violation of New York Penal Law Section 722, Subdivision 3. As construed by the New York courts, this law punishes only the refusal to obey a reasonable order [*People* v. *Galpern*, 259 N.Y. 279 (1932); *People* v. *Nixon*, 248 N.Y. 182 (1928); see *People* v. *Penn et al.*, 48 Misc. 2d 634 (App. Term, 1st Dept. 1964), aff'd 16 N.Y. 2d 581 (1965), *cert. denied* 383 U.S. 969 (1966). The criteria of reasonableness are the necessities of the situation in which the order was issued. Illustrative of New York's construction of the "reasonable order" is the Court of Appeals' decision in *People* v. *Feiner*, 300 N.Y. 391 (1950), upholding defendant's conviction under Subdivision 3. Addressing a sidewalk crowd of about seventy-five people, Feiner several times refused to move on when ordered to do so by a policeman. Deeming the order lawful, the Court of Appeals relied upon the evidence that the crowd "filled the sidewalk and spilled out into the adjacent thoroughfare, obstructing or impeding both pedestrian and vehicular traffic" [*id.* at 400], and that defendant's speech "inflamed and agitated" the audience to the point that "violence was threatened" [*id.* at 402].

That judgment was reviewed by this Court in *Feiner* v. *New York*, 340 U. S. 315 (1951). There, considering for the first time the constitutionality of a "move on" statute, this Court affirmed the conviction, relying, as did the high court of New York, on the traffic disturbance and inflammatory nature of defendant's speech.

More recently, this Court addressed itself to a "move on" statute in *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965). Defendant there was convicted under a Birmingham ordinance setting forth two separate and disjunctive offenses: (1) obstruction of free passage on a sidewalk or street; (2) failure to obey a police order to move on. Deeming unconstitutional the latter provision because it allows a person to stand on the sidewalk "only at the whim of any police officer" [*id.* at 90], this Court reversed the conviction on the ground that it might have been based on the unconstitutional part of the ordinance (the trial court had rendered no opinion).

However, while striking down the Birmingham ordinance, the Court observed that two years after Shuttlesworth's conviction, the Alabama Supreme Court, in another case, had construed the ordinance to read in the conjunctive so that failure to move on was not punishable unless the accused was " 'blocking free passage' " [*id.* at 91]. All members of this Court—as expressed in the majority opinion and the three concurring opinions—agreed that the Birmingham ordinance, as thus construed by the Alabama courts, was constitutional. As noted by Mr. Justice FORTAS in his concurrence:

> "[I]f there were a rational basis for charging Shuttlesworth with violating the section as so construed,

> he could be retried if Alabama should choose so vigorously to protect the sidewalks of Birmingham. Civil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law" [*id.* at 100].

Supporting the *Feiner* decision and the *Shuttlesworth* dictum is a sound and moderate "accommodation of opposing interests",* which supports as well the determination of the New York courts herein. While the highly valued First Amendment right of expression must never be defeated, the time, place, and manner of its exercise are subject to minimum regulation in the interests of demonstrable requirements of public safety and freedom of movement [*Hague* v. *CIO*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Cox* v. *Louisiana*, 379 U. S. 536 (1965)]. There can be no absolute dogma that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please" [*Adderley* v. *Florida*, 385 U. S. 39, 48 (1966)]. Fire marshals, for instance, could certainly halt a meeting in premises unsafe for their use. Free exercise of the right of speech yields to prevention of the collapse of the floor.

So, too, assurance of the "safety and convenience" of persons on the public ways has long been deemed a value of sufficient importance to warrant regulation of public

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* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. Jour. 877, 947 (1963).

assemblies [*Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941)]. Ordinary commerce and the normal use of public thoroughfares are the modest marks of a peacetime community. Abrogation is not dictated by the freedom of the public to assemble. For assembly, regardless of how large, need not interfere with the flow of commerce, unless its organizers intend it to do so. Here, in selecting Times Square, a spot wholly unrelated to the purpose of the meeting, the sponsors must have chosen the place not for its suitability for assembly, but rather because they could reasonably expect to attract attention, perhaps draw a crowd, and, hopefully, create a newsworthy snarl. The greater their success, the greater the reasonably anticipated interference with the commerce of Times Square. Such intentional obstruction is not a constitutionally guarded privilege, subsumed by the protections of speech, assembly, or even petition for redress of grievances. There is no conflict of values here. Unlike revolution, bona fide oral expressions of political dissent can be easily accommodated within a peaceful community.

Of course, not any or all police regulation in the name of traffic control justifies dispersal of a public assembly. Minor inconveniences, obstruction of momentary duration —frustrations expected and constantly encountered by the modern urban dweller under ordinary circumstances—do not call for police interference with the bothersome activity. It is, rather, the substantial, the hazardous—the "hard core" [*Shuttlesworth* v. *Birmingham*, *supra* at 99 (BRENNAN, J., concurring)]—obstruction, afflicted on their fellow citizen by demonstrators, that justifies the police order to disperse.

The facts of the instant case evidence that degree of interference with "safety and convenience" [*Cox* v. *New Hampshire*, *supra* at 574] which justifies police action. At New York's central intersection at a busy time, petitioners' assembly overflowed the sidewalks into the roadway, causing oncoming automobiles to "veer sharply" (R. 12). The safety hazard caused by the swerving automobiles—to other vehicles, to demonstrators in the street and to other pedestrians forced into the street—is obvious. Nor was the inconvenience to pedestrians minor. In addition to having to walk out in the roadway of a major thoroughfare, pedestrians' access to a bus stop on the Square was obstructed. Indeed, petitioners' assembly here was an enactment of this Court's illustration of street activity properly subject to dispersal by the government:

> "Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement" [*Cox* v. *Louisiana*, 379 U. S. 536, 554-5 (1965)].

The petitioners insist, however, that the police efforts at dispersal were "pre-determined," to effectuate a ban on meetings of "political dissent" in the midtown area and wholly unrelated to traffic considerations (brief, pp. 5, 15). Were these allegations borne out by the record, a patently obnoxious case of arbitrary official restraint of cherished rights would be presented. The record, however, contradicts the assertion. Even the petitioners' own witness quotes the police officer as announcing a non-discriminatory ban on all meetings in the mid-town area, and sug-

gesting the group move south of 40th Street or north of 59th Street (R. 144, 200, cited by petitioners).

Moreover, the People's testimony clearly established that far from "pre-determined," the police action was an on the spot "estimate of a particular local situation" [*Feiner* v. *New York, supra* at 321 (concurring opinion, FRANKFURTER, J.)], and that the resulting order to move on was dictated exclusively by traffic and safety factors (see R. 9, 77, 97, 110). Indeed, during the half-hour period prior to the order to disperse, as numerous demonstrators collected on and near the Square, unfolding placards and setting up effigies, several of the arresting officers stood by, at no time stating to the group that demonstrations were banned in that area (R. 4, 5, 30, 107).

Wholly distinguishable are the two recent cases upon which petitioners primarily rely, *Cox* v. *Louisiana, supra,* and *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). Those cases, like the present one, concerned convictions of persons engaged in a protest meeting under a statute punishing the failure to obey police orders to move on. Similarity, however, ends here. Each of those convictions was reversed because the "move on" statutes as construed by the South Carolina and Louisiana courts were "so generalized" as "to make criminal the peaceful expression of unpopular views" [*id.* at 237; *Cox* v. *Louisiana, supra* at 551-2]. In contrast, the high court of New York in *Feiner* firmly rejected use of Section 722, Subdivision 3 as a tool "to silence unpopular opinions" [*People* v. *Feiner, supra* at 401].

Nor does the record here contain any evidence that the police orders were issued because the views of the demonstrators were "opposed to the views of the majority of the

community'' [*Edwards* v. *South Carolina, supra* at 237]. Petitioners baldly assert that the record establishes that the police orders were ''motivated by hostility to * * * [their] unpopular views'' (brief, p. 15), but they cite no support in the record for this declaration, nor could they.

Additionally, in *Edwards,* this Court found ''no obstruction of pedestrian or vehicular traffic'' within the area in question [372 U. S. at pp. 231-2]. And, in *Cox,* this Court observed that the demonstrators ''did not obstruct the street'' [379 U. S. at p. 541].

Penal Law, Section 722(2)

Further, even if this Court deems unlawful the police orders to disperse in the instant case, thus voiding the conviction under Subdivision 3, the subsequent acts committed by defendants in the course of their refusal to move on brings their conduct within the scope of Subdivision 2 of the statute.

That subdivision, as construed by the New York courts, proscribes conduct causing ''serious annoyance'' to others [*People* v. *Carcel,* 3 N.Y.2d 327, 331 (1957); see *People* v. *Perry,* 265 N.Y. 362 (1932); *People* v. *Most,* 171 N.Y. 423 (1902)]. In contrast to generalized breach of the peace statutes like that of South Carolina condemned by this Court in *Edwards* v. *South Carolina, supra* at 237, Subdivision 2 of Section 722, like Subdivision 3, has been ''limited to define and punish specific conduct lying within the domain of state power'' [*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 573 (1942)]. Illustrative of the narrow compass of Subdivision 2 is the New York Court of Appeals reversal of two leaflet distributors' conviction under this provision

because the evidence showed "only * * * that the defendants were blocking the pedestrians' right of way" [*People v. Carcel, supra* at 332].

In sharp contrast to that mild disturbance, the evidence in the present case established that after the police had several times requested the demonstrators to move on, petitioners purposefully agitated the gathering in the Square, into a disorderly mob. Understandably, defendants never—neither in the state courts nor in this Court—challenged the People's proof under Subdivision 2. Their sole claim as to the application of this provision to their acts after the police order to disperse is that due process was violated because the complaint gave "no indication that any of them was charged with any * * * matters occurring after the [police] order" other than their "failure to move on" (brief, p. 12).

However, the distinction petitioners attempt to draw between their failure to obey the police order and subsequent acts is specious, for, as the opinion below in the Appellate Term observed, the totality of petitioners' conduct "after the order is material and proper in showing the failure to obey it" (R. 294). For example, after the order to disperse, some petitioners sat down on the sidewalk and some lay down in the street. This conduct in itself was the "failure to obey the dispersal order" which petitioners concede is properly charged in the complaint. Petitioners' attempt to separate the act of failure to move on and these disorderly acts offends sound reason.

Moreover, the language of the complainant, as the Appellate Term properly noted, fully embraces their behavior after the order to disperse. The complaint states that:

> "The defendants did unlawfully congregate and assemble at the above location [Duffy Square] obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful." (R. 1)

Clearly, petitioners had fair notice that all of their "obstructions" and "boisterous" acts at Duffy Square were the subject of the complaint. Dispelling any question as to the scope of the complaint is the heading, charging the time in question as "4:25 p.m." This was fully twenty minutes after the first police order to the crowd that they disperse and nearly ten minutes after additional policemen were summoned to the scene (R. 5, 90, 107, 112). Petitioners' eruption into riotous behavior, it will be recalled, began when the additional police assistance arrived. Unquestionably, then the complaint adequately notified petitioners that they were charged with the full extent of their conduct on the day in question.

In sum, the police order to disband was reasonable, dictated by those demands of safety and proper use of public streets which have long and wisely governed regulation of the time, place and size of assemblies. Failure to obey the order is itself a punishable offense. In addition, where, as here, the manner of disobedience creates an annoyance and further disorder, it is punishable as well under a separate, clear, and express prohibition. Therefore, neither the police order, nor the petitioners' arrests and convictions for disobeying it, infringed upon the constitutionally guar-

anteed right to gather in an appropriate place to express political dissent and grievance. Neither the rights of speech nor of free public passage need suffer by the warranted police conclusion that Times Square is not a proper meeting hall for a crowd of the size which congregated there on an August Saturday afternoon.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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March, 1967

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Supreme Court of the United States

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REPLY BRIEF FOR PETITIONERS

Respondent's brief (p. 27) seeks to overcome the contention that petitioners were convicted of offenses not charged in the complaint by reference to the time—4:25 P. M.—set forth in the complaint. The argument is that this should have alerted defendants to the fact that they were being charged with the various disorderly acts committed after the order to disperse, not merely with refusal to obey that order. We submit that the contention is without merit.

In the first place, the complaint (R. 1) gives no hint that any of those disorderly acts were charged. There is no reference to lying down in the street, hitting a horse, or any of the matters dwelt on in the opinion of the Appellate Term. (R. 296, 97). On the contrary, the whole impact is

that the police ordered the meeting broken up because it was then already unlawful.

In any event, however, it is well settled law in New York that the precise time charged is not binding on the prosecution so that proof of the commission of the crime at a different time is not a variance.

As Chief Judge Conway said in *People* v. *La Marca*, 3 N. Y. 2d 452 (cert. denied 355 U. S. 920), at 458:

> "It is well settled that except where time is a material ingredient of the crime the prosecution is not confined in its evidence to the precise date laid in the indictment, but may prove that the offense was committed at any time prior to the commencement of the prosecution and such proof does not constitute a material variance (Code Crim. Pro., § 280; *People* v. *Jackson*, 111 N. Y. 362, 369; *People* v. *Krank*, 110 N. Y. 488, 492; 42 C. J. S., Indictments and Informations, § 257, p. 1277; 27 Am. Jur., Indictments and Informations, §§ 70-72, pp. 633-635). * * *

Cf. *People ex rel. Miller* v. *Hoy*, 232 N. Y. Supp. 2d 134.

There can be no contention here that the precise time of the offense was an ingredient of the crime. Therefore the reference in the complaint to 4:25 P. M. had no significance whatever.

Respectfully submitted,

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END